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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

FEDERAL TRADE COMMISSION,)	
et al.,)	
)	
Plaintiffs,)	Case No. 3:24-cv-00347-AN
)	
v.)	
)	
THE KROGER COMPANY and)	September 13, 2024
ALBERTSONS COMPANIES, INC.,)	
)	
Defendants.)	Portland, Oregon
)	

PRELIMINARY INJUNCTION HEARING
DAY 14 - MORNING SESSION
BEFORE THE HONORABLE ADRIENNE NELSON
UNITED STATES DISTRICT COURT JUDGE

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TRANSCRIPT OF PROCEEDINGS

(September 13, 2024)

(In open court:)

DEPUTY COURTROOM CLERK: All rise.

THE COURT: Good morning. Please be seated.

We're in day 14 of the preliminary injunction hearing in Case No. 3:24-cv-00347. The Federal Trade Commission and Plaintiff States, et al. v. the Kroger Company and Albertsons Companies, Incorporated.

We're ready for preliminary matters and/or appearances of new counsel.

MS. MUSSER: I do have a few preliminary matters. I don't have anyone new to introduce today. I don't know if my colleague does.

MR. PERRY: Your Honor, defendants have no new counsel to introduce, and I think the Government is taking the lead on the preliminaries. All of which I believe we have discussed.

MS. MUSSER: So the first one, we had previously introduced PX7004, which is Dr. Hill's expert report. For the record, we just wanted to make clear that we were also introducing with that some supplemental tables, which, just for the record, are PX7004A, PX7004B, PX7004C, PX7004D-1, and PX7004D-2.

We understand there's no objection.

1 MR. PERRY: No objection, Your Honor.

2 THE COURT: They all will be received.

3 MS. MUSSER: And a few other points about
4 post-trial briefing and closing logistics, which I'm happy
5 to address now or at the close the day, whichever Your
6 Honor prefers.

7 THE COURT: It's fine. Do it now.

8 MS. MUSSER: On closing, I just wanted to get the
9 Court's -- let the Court know that we would request
10 permission to, again, split closing with my colleague
11 Ms. Hall, as well as reserve some time for rebuttal, if
12 that's okay with the Court.

13 THE COURT: Absolutely. It's standard.

14 MR. WOLF: Yes, Your Honor, a rough estimate of
15 how much time they will reserve will be helpful for us.

16 MS. MUSSER: I think we will reserve about a half
17 hour.

18 MR. WOLF: Very good, Your Honor.

19 MS. MUSSER: And separately, when you --
20 discussing the timing for proposed findings of fact and
21 conclusions of law, the schedule says ten days after the
22 evidentiary hearing concludes. The parties are in alignment
23 that Tuesday would be the conclusion of the hearing.

24 THE COURT: That is true.

25 MS. MUSSER: Okay.

1 THE COURT: We were all on the same -- of the same
2 mind. It's Tuesday.

3 MR. PERRY: Thank you, Your Honor.

4 MS. MUSSER: Your Honor, just for clarity, that
5 would make findings due September 27th. I assume at
6 5:00 p.m. Pacific Time.

7 THE COURT: Pacific Time.

8 Well, 5:00 p.m. Pacific Time. I know it may come in at
9 4:59 Pacific Time. I understand.

10 MS. MUSSER: Hope springs eternal, Your Honor, but
11 we'll see. Definitely by 5:00.

12 THE COURT: All right.

13 MS. MUSSER: And then the final point to discuss
14 with the Court is we had raised at the preliminary -- the
15 pretrial conference the possibility of additional briefing.

16 THE COURT: Yes.

17 MS. MUSSER: We -- plaintiffs' position is
18 additional -- a few additional issues that have come up
19 through the course of this hearing could benefit from some
20 additional briefing, but of course want to take direction
21 from the Court as to what the Court would find helpful and
22 any parameters. I know there's been a lot of paper and a
23 lot of documents; so, of course, we, at the end of the day,
24 want to be as helpful to the Court as possible.

25 THE COURT: Have the two of you conferred as to

1 the issues that you would like to brief?

2 MS. MUSSER: We have not had an opportunity to do
3 that, but we're happy to confer.

4 THE COURT: Can you do that? And we'll talk about
5 that at the closing argument.

6 I hope that counsel has felt or at least noticed,
7 during the course of the time that we have been together,
8 that I am open to additional briefing. I know that this is
9 a voluminous case, in terms of number of documents, but that
10 doesn't mean that I don't want to hear from counsel and the
11 parties on additional issues that they feel is important for
12 the Court to consider when making this decision.

13 MR. WOLF: Your Honor, I assume that the timing --
14 whatever we agree to, in terms of approach, and we'll
15 present to Your Honor for your approval, but the timing
16 would be concurrent with the findings of fact and
17 conclusions of law?

18 THE COURT: Yes. Yes.

19 MR. PERRY: Thank you, Your Honor. We will meet
20 and confer, and if there are any issues to be addressed,
21 we'll do it at the conclusion of the closings.

22 THE COURT: And, again, remember we moved it up to
23 8:30, just to give people an extra cushion because we pushed
24 hard yesterday, and I appreciate all of you because we came
25 in 30 minutes early, we had a 30-minute lunch, and we

1 finished at 4:59. Look at that.

2 MS. MUSSER: I think that's all from the
3 plaintiffs, Your Honor.

4 MR. PERRY: Your Honor, defendants have one issue.

5 THE COURT: All right.

6 MR. PERRY: As the Court is aware, the parties
7 have been working very closely together on confidential
8 information --

9 THE COURT: Yes. Yes.

10 MR. PERRY: -- including for third parties in the
11 courtroom, and we have not had to seal the courtroom, at the
12 Court's request, and I think it's worked very well.

13 The first witness today does have some confidential
14 information regarding the internal operations of Kroger.
15 Your Honor, we have been using the private screens. There
16 are our tech people at the back and, on occasion, there have
17 been audience members who might have been trying to get a
18 little too close to the screens.

19 THE COURT: Oh, my, my, my, my.

20 MR. PERRY: And we would just ask that the
21 audience please not -- if it's on the private screens, it
22 means it's on the private screens, and that means it's not
23 available for viewing by them, by agreement of the parties
24 and understanding with the Court.

25 THE COURT: That is the Court's understanding, and

1 you cannot look at it.

2 In the abundance of caution, maybe you want to just use
3 the binders.

4 MR. PERRY: Well, we could do that if it's
5 truly -- I don't think it's really -- it has not really
6 been -- because we've been monitoring, Your Honor.

7 THE COURT: I see.

8 MR. PERRY: I just wanted to flag it for today's
9 testimony, that it's an issue; and if we have to raise it
10 again with the Court, we may come back, but I just wanted to
11 raise it.

12 THE COURT: Fair enough. Fair enough.

13 But, you know, the Court did a Courtroom Management and
14 Decorum Order, and I am glad, with the exception of having
15 to modify that we will not have a public line for closing
16 arguments because there was someone -- or there were --
17 there were -- everyone didn't follow that order.

18 The Court is very willing and able and will enforce
19 every condition that I've already said. So do not look at
20 the private screen when it is up, and we'll move forward.

21 MR. PERRY: Thank you, Your Honor.

22 THE COURT: You will get removed. Let me just be
23 clear: You will be removed.

24 MS. MUSSER: Nothing further. Thank you.

25 MR. PERRY: Nothing further.

Yeater - D

1 THE COURT: All right. You may call your witness.

2 MS. BALBACH: Good morning, Your Honor.

3 THE COURT: Good morning.

4 MS. BALBACH: Jeanine Balbach for the Federal
5 Trade Commission.

6 At this time the plaintiffs call Mr. Aaron Yeater to
7 the stand.

8

9

AARON YEATER,

10 called as a witness in behalf of the Plaintiffs, being first
11 duly sworn, is examined and testified as follows:

12

13

THE WITNESS: I do.

14

15 DEPUTY COURTROOM CLERK: Thank you. Please have a
16 seat. State and spell your first name for the record.

17

18

19 THE WITNESS: First name is Aaron, A-a-r-o-n; and
20 my last name is Yeater, Y-e-a-t-e-r.

21

22

DIRECT EXAMINATION

23

BY MS. BALBACH:

24

Q. Good morning, Mr. Yeater.

25

A. Good morning.

26

27 Q. You should have a binder in front of you, and in that
28 binder you should have a copy of a demonstrative and your
29 expert report submitted in this case.

Yeater - D

1 The demonstrative is marked PDX16.

2 Was this demonstrative prepared at your direction?

3 A. Yes, it was.

4 MS. BLACKBURN: I'm going to ask my colleague,
5 Mr. Duncan, to put the demonstrative up.

6 As my colleague stated, there's a lot of confidential
7 information this morning, Your Honor, so we will endeavor to
8 keep the -- most of the slides on the private screens.

9 THE COURT: All right.

10 BY MS. BALBACH: (Continuing):

11 Q. Mr. Yeater, can you please describe your background and
12 academic training?

13 A. Yes. I live in Massachusetts, but I was raised in
14 Fargo, North Dakota. I attended Wesleyan University in
15 Middletown, Connecticut, and received a bachelor's degree
16 from the College of Social Studies in 1994; and then in 2003
17 I graduated from the Yale School of Management with an MBA.

18 Q. What did you study at Yale?

19 A. At Yale, I studied economics and finance. Though as
20 part of the MBA curriculum, I also had exposure to
21 operations, statistics, accounting. All of those were part
22 of my academic work there.

23 Q. Did you have any exposure to antitrust at Yale?

24 A. I did. I served as the teaching assistant to
25 Fiona Scott Morton, who was an economics professor there and

Yeater - D

1 is an antitrust scholar and the former deputy attorney
2 general for antitrust economics at the DOJ, and as part of
3 the course that we worked on together, she taught some
4 segments that were focused on antitrust.

5 So that's kind of where my interest started.

6 Q. What is your work background?

7 A. Prior to graduate school, I worked at the Kennedy
8 School of Government at Harvard as a program assistant for a
9 program focused on improving the effectiveness of government
10 programs and for a couple of public policy organizations in
11 Massachusetts.

12 After graduate -- graduating from Yale, I joined
13 Analysis Group which is an economic consulting firm located
14 in Boston.

15 Q. What is your role at Analysis Group?

16 A. So my title is managing principal, which is a partner,
17 and I work on matters -- primarily, litigation matters
18 related to economic issues in litigation.

19 Q. Do you have a particular type of work that you
20 specialize in?

21 A. Most of my work is in antitrust and consumer
22 protection.

23 Q. How many of the matters you have worked on are
24 antitrust matters?

25 A. About 150 in my time at Analysis Group.

Yeater - D

1 Q. And how many are merger investigations that you've
2 worked on?

3 A. I've worked on 14 merger investigations in my time.

4 Q. Has any of your work been in the food space?

5 A. Yes. I was retained previously as an expert for the
6 FTC in a case involving the production and distribution of
7 breakfast cereal, and I've worked on several cases in my
8 career, though not antitrust cases, that also involve issues
9 in the food industry, concerning French fries, deli turkey,
10 ready-made pizza pockets, and a few other products.

11 Q. Has your work included the analysis of merger
12 efficiencies?

13 A. Most of the merger investigations that I worked on, we
14 focused on efficiencies as part of the assignment; and in
15 several of the litigations, issues concerning merger
16 efficiencies have actually been relevant as well.

17 Q. Have you been recognized by any court as a financial
18 and economic expert in any litigation?

19 A. I was -- I testified and was recognized as an expert in
20 the U.S. District Court for the District of Massachusetts.

21 Q. And has any court excluded you from testifying as an
22 expert?

23 A. No.

24 MS. BALBACH: Your Honor, at this point I would
25 like to tender Mr. Yeater as an expert in fields of finance

Yeater - D

1 and economics.

2 MR. WOLF: Your Honor, this was the subject of an
3 MIL. As you know, when Your Honor ruled, the subject he's
4 being tendered for today is actually slightly different than
5 the subject in the MIL, so we have no objection to his
6 classification as an expert as to those topics.

7 There may be some that we do object to, but we'll deal
8 with those in cross-examination with Your Honor's leave.

9 THE COURT: Absolutely. So he will be designated
10 as an expert in those two fields.

11 MS. BALBACH: Thank you, Your Honor.

12 BY MS. BALBACH: (Continuing):

13 Q. Mr. Yeater, what was your assignment with regard to the
14 proposed acquisition by Kroger of Albertsons?

15 A. So my assignment was to evaluate the parties' claims
16 with regard to synergies and efficiencies that they claim
17 will result from the merger and to evaluate the claims and
18 analyses provided by Mr. Gokhale with regard to whether
19 those efficiencies and synergies are verifiable and
20 merger-specific and also to review his report and respond to
21 other arguments that he made in there.

22 Q. Did you explain your assignment and opinions in an
23 expert report?

24 A. I did. Two, in fact.

25 Q. Is your opening report, the first report in the binder

Yeater - D

1 in front of you at the tab labeled PX7000?

2 A. Yes, it is. Yes, it is.

3 Q. And is your rebuttal report in that same binder at the
4 tab labeled PX7011?

5 A. Yes, it is.

6 MS. BALBACH: Your Honor, I move to admit PX7000
7 and PX7011.

8 MR. WOLF: No objection.

9 THE COURT: They both will be received.

10 MS. BALBACH: Thank you.

11 BY MS. BALBACH: (Continuing):

12 Q. Moving on to your specific opinions, did you reach any
13 opinions in this matter? And I believe we have a slide.

14 A. I did. I prepared a demonstrative that summarizes my
15 opinions.

16 Q. And this can remain on the public screen.

17 What are the opinions you reached in this matter?

18 A. So the three opinions I reached are -- the first is
19 that prior mergers that the party referred to -- parties --
20 excuse me -- referred to, do not demonstrate that promised
21 price investments have occurred; the second opinion is that
22 most or almost all of the claimed deficiencies are not
23 verifiable or merger-specific under the guidelines; and the
24 third is that, if achieved, the claimed cost efficiencies
25 would be a small share of the firm's combined costs.

Yeater - D

1 Q. Let's talk about that first opinion regarding price
2 investments.

3 Can you briefly explain your opinion.

4 A. Yes. My understanding is that the parties have
5 referred to transactions that they undertook and the fact
6 that price investments occurred subsequent to those
7 transactions and referred to those as support for the
8 expectation that they will make price investments in this
9 after this transaction.

10 Q. In your expert report, did you review the parties'
11 claims that they have made price investments following
12 certain past mergers?

13 A. I reviewed the evidence I understand the parties
14 presented, yes.

15 Q. And which past mergers did you look at?

16 A. The Kroger acquisition of Harris Teeter and the Kroger
17 acquisition of Roundy's.

18 Q. What were Kroger's claims about price investments at
19 Harris Teeter after that merger?

20 A. My understanding is that the parties pointed to what
21 they have referred to, or it has been referred to, as "an
22 erosion of gross margin" from the period of 2014 to 2021, as
23 evidence for the fact that price investments were made at
24 Harris Teeter at expected levels.

25 Q. And what was your opinion about that claim?

Yeater - D

1 A. So I think it's already been discussed in the
2 proceeding that erosions of gross margin can occur for a
3 number of different reasons. It could occur because
4 prices -- because of a decision to reduce prices. It could
5 be that prices increase but not as quickly as the cost of
6 goods sold increases. It could be that the distribution of
7 products -- or the allocation of products -- excuse me -- on
8 shelves has changed, and it could also be that the
9 purchasing behavior of a customer changes and the mix of
10 products that are purchased change.

11 So in and of itself, the gross margin doesn't tell us
12 whether price -- gross -- sorry -- the gross margin does not
13 tell us whether price investments were made.

14 MS. BALBACH: I'm going to ask, Mr. Duncan, to
15 move to the next slide, but keep this on the private screen,
16 please.

17 So this is slide 3.

18 BY MS. BALBACH: (Continuing):

19 Q. And I'll caution Mr. Yeater not to read the words on
20 this slide.

21 A. Of course.

22 Q. Mr. Yeater, is there any other evidence you have seen
23 about price investments at Harris Teeter?

24 A. Yes. My understanding is that subsequent to the
25 transaction, the parties performed or -- excuse me -- Kroger

Yeater - D

1 performed an analysis of the transaction, and in that
2 analysis, they concluded that the promised price
3 investments -- or, I should say, the expected price
4 investments -- had not been made because Harris Teeter
5 operated autonomously from Kroger and made decisions counter
6 to the expectations of management.

7 Q. And what were the parties' claims about price
8 investments at Roundy's after the merger with Kroger?

9 A. Similarly, my understanding is that the parties claimed
10 that, in the case of Roundy's, they had also budgeted and
11 made price investments. Though the documents that I've
12 reviewed suggested that there was an erosion of gross margin
13 but that the amount of price investments fell short of what
14 was budgeted.

15 Q. Have you heard any other testimony in this proceeding
16 that changes the opinions you expressed in your report about
17 price investments?

18 A. During the trial, I heard Mr. Aitken testify that, at
19 times, the company has not made price investments in order
20 to make its earnings expectations, which is consistent, I
21 think, with my view of the circumstances in which they would
22 choose to make price investments.

23 MR. WOLF: Your Honor, objection. The witness is
24 stating that there was testimony in this trial that never
25 occurred. So I would move to strike that.

Yeater - D

1 MS. BALBACH: Can I ask him about his basis for --

2 THE COURT: No. I'm going to sustain the
3 objection.

4 MS. BALBACH: Okay.

5 THE COURT: He can't talk about evidence that has
6 not been presented.

7 MS. BALBACH: Okay. We'll move on.

8 We can go to slide 4, which, I believe, can come up on
9 the public screen.

10 BY MS. BALBACH: (Continuing):

11 Q. Mr. Yeater, let's turn next to you -- to your next
12 opinion.

13 And looking at your summary of opinions, in your
14 report, did you summarize the role of efficiencies in merger
15 analysis?

16 A. I did, yes.

17 Q. And what is the role of efficiencies in merger
18 antitrust analysis?

19 A. So as I discussed in my report in the guidelines, the
20 guidelines focus on the question of whether there is harm to
21 competition from the elimination of a competitor, and when
22 there's a finding that there's a harm to competition, the
23 next question that we ask is whether there are sufficient
24 improvements in the company's operations to allow it to
25 offset the -- the harm to competition that's experienced,

Yeater - D

1 and that's the purpose of merger analysis.

2 We focus on those questions in that context.

3 Q. How does the assessment of efficiencies apply in this
4 case?

5 A. My understanding is that Dr. Hill's analysis has found
6 that there will be some harm to competition from the
7 elimination of a competitor and, as a result, the question
8 of whether there are sufficient efficiencies to offset that
9 harm becomes relevant.

10 Q. Are all the benefits of the merger important to the
11 efficiencies analysis?

12 A. Not typically.

13 Mergers can create many benefits for the firm and for
14 its shareholders, and the -- but some of those would not
15 necessarily improve the operations of the firm in a way that
16 would allow it to offset any competitive harm, and so
17 typically we wouldn't analyze those.

18 Q. Can you give us an example of a benefit of a merger
19 that may not affect the firm's ability to compete?

20 A. One of the articles that I cited in my report, from
21 Nancy Rose, Professor Nancy Rose, at MIT, points to the
22 example of one-time tax benefits. Those would be something
23 that could occur as a result of the merger, but they
24 wouldn't necessarily enhance the competitiveness of the
25 firm, and so we would typically set those aside, but

Yeater - D

1 certainly they would be to the benefit of shareholders.

2 Q. The parties have included numerous synergy claims in
3 this matter. Which claims do you focus on?

4 A. I'm focused on what I would call the cost efficiencies.
5 Basically, the reductions in the cost of operating from an
6 effort to identify efficiencies.

7 Those are the ones that I think would be relevant to
8 evaluating or considering whether there are offsets to
9 Dr. Hill's analysis.

10 Q. What were the other claimed synergies?

11 A. The parties point to what they refer to as "revenue
12 synergies."

13 I think most of them Mr. Gokhale found were not
14 verifiable or merger-specific. Although I think he did in
15 one category.

16 And those would be categories in which the firm expects
17 to generate more revenue as a result of some combination of
18 activities or assets from the merger.

19 Q. Can you give us an example?

20 A. The category that Mr. Gokhale found to be verifiable
21 and merger-specific was a category called "Alternative
22 Profit Streams," which, I understand, involves the
23 combinations of data between the two firms, would allow it
24 to sell data-related products to consumer packaged goods
25 companies for the purposes of supporting their strategies

Yeater - D

1 and perhaps marketing activities.

2 Q. Did Mr. Gokhale reach any opinions about alternate
3 profit streams synergy claim?

4 A. Yes. As I said, he found them to be verifiable and
5 merger-specific.

6 Q. And did you reach any opinions about the alternative
7 profit streams in your report?

8 A. The only opinions that I offered in my report about
9 alternative profit streams were that, first, that it wasn't
10 a cost efficiency and therefore wouldn't reflect the change
11 in the company's costs. Again, relevant to the -- to the
12 offset analysis that I described.

13 And, secondly, that the -- that, as far as I understood
14 it, the products offered from their retail media services
15 business would not be products that are part of the
16 market -- relevant antitrust market defined by Dr. Hill.

17 Q. Turning now to your work in evaluating -- evaluating
18 the parties' claimed cost synergies, did you use a
19 particular framework in your report to assess the claimed
20 cost synergies?

21 A. Yes, I did.

22 Q. And where does that framework come from?

23 A. It comes from the merger guidelines.

24 Q. Let's go to your next demonstrative.

25 MS. BALBACH: And we can keep this on the public

Yeater - D

1 screen.

2 BY MS. BALBACH: (Continuing):

3 Q. At a high level, can you explain the framework you used
4 in your report to assess the parties' claimed cost
5 synergies?

6 A. Yes, I can.

7 The framework has two components for my analysis. The
8 first is, is the claimed efficiency verifiable, based on the
9 underlying data and an evaluation of the assumptions used to
10 produce it? And then the second is whether the claimed
11 efficiency is merger-specific or, alternately, whether it
12 could be achieved via alternate means.

13 Q. Can you expand on what "verifiability" means?

14 A. Yes. Verifiability means looking under the hood at the
15 calculations done by the parties to estimate their
16 efficiencies, reviewing the data and the math used to make
17 calculations, and confirming that those are correct, and
18 then looking at the assumptions made along the way, because
19 the analysis typically, or often, includes such assumptions,
20 to make sure that we can trace those back and understand
21 where they come from and, where possible, test their
22 reliability.

23 Q. How does this compare to Mr. Gokhale's approach to
24 verifiability?

25 A. Mr. Gokhale and I agree that verifiability is an

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1 important question under the guidelines, and we agree that
2 reviewing the data and evaluating the math is certainly an
3 aspect of the verifiability analysis.

4 I think we disagree to the extent -- with the extent to
5 which assumptions need scrutiny.

6 Q. Turning to your second component of the framework, can
7 you expand on what "merger specificity" means?

8 A. Yes. It may be helpful to refer to the discussion we
9 just had. Because part of the exercise in antitrust merger
10 analysis is considering whether any competitive harm can be
11 offset, we want to focus specifically on the efficiencies
12 that only the merger can provide, because, ultimately -- or
13 because we start with the understanding or the finding that
14 there's been a harm to competition, and so we want to
15 isolate just those benefits that can arise only through the
16 merger.

17 Q. And how does this compare to Mr. Gokhale's approach to
18 merger specificity?

19 A. Again, I think he agrees -- as I understood his
20 testimony, he agrees that this is an important prong of
21 analysis under the merger guidelines. I think we differ in
22 implementation.

23 Q. Moving on to cost efficiencies, can you summarize
24 your -- the findings from your expert report across various
25 categories of the claimed cost -- cost efficiencies?

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1 And I think you have a slide here.

2 MS. BALBACH: Again, this should go up only on the
3 private screen.

4 So if we can go to slide 6, and I'll repeat my
5 question.

6 BY MS. BALBACH: (Continuing):

7 Q. Can you summarize the findings from your expert report
8 across the various categories of claimed cost efficiencies?

9 A. Yes. The slide on the screen just shows my conclusions
10 in the most-right-hand column for each category of
11 efficiency, Mr. Gokhale's conclusions, and the amounts that
12 the parties estimated in the first instance.

13 Q. And to preserve confidentiality, I'll remind you not to
14 read out any of the numbers on this.

15 A. Thank you.

16 Q. So starting on the far left, there's a column -- and
17 can you briefly identify what's represented by the words in
18 the column labeled "Category"?

19 A. Yes. Those -- that column just describes the different
20 types of efficiencies that the parties have identified; and,
21 broadly, the efficiencies fall -- cost efficiencies fall
22 into four categories: sourcing, supply chain and
23 manufacturing, administrative labor, and the last one is
24 fuel.

25 I'll note that the fuel efficiency is, in many

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1 respects, a sourcing efficiency, but the parties included it
2 in a separate category in their documents.

3 Q. And on the right, in those two columns, there are some
4 red Xs. What do those red Xs mean?

5 A. So those are the categories where either I or
6 Mr. Gokhale found that none of the estimated amounts of the
7 efficiencies were verifiable and merger-specific; and, in
8 certain cases, Mr. Gokhale and I find that some part of the
9 efficiency is verifiable and merger-specific.

10 Q. Let's talk about those categories.

11 To start, can you give us an example of one of the
12 claimed cost efficiencies that you found, at least in part,
13 to be verifiable and merger-specific?

14 A. Yes. I think it makes sense to use the category of
15 "Administrative Labor," and I think I've got -- we have a
16 demonstrative for that as well.

17 Q. Yes.

18 MS. BALBACH: And this should remain on the
19 private screen.

20 BY MS. BALBACH: (Continuing):

21 Q. And what is included in the administrative labor cost
22 efficiency claims that you're talking about in this slide?

23 A. So administrative labor refers to that category of
24 employees of the companies who perform administrative
25 functions. So not typically working in stores or serving

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1 customers, and functions like legal or accounting, as well
2 as senior executives of the company.

3 And it is typical, or at least often the case, that
4 some amount of redundancy results from the merger that can
5 be eliminated, and that's what the efficiency tries to
6 capture.

7 Q. So turning to this slide, at the very top, can you
8 briefly explain what you mean by "Gokhale Low End" and
9 "Gokhale High End"?

10 A. Yes. Mr. Gokhale offered two estimates of this
11 efficiency -- a low-end estimate -- that's the left-hand
12 column -- and then a high-end estimate in the right-hand
13 column.

14 Q. For the first prong of your efficiencies or the
15 efficiencies framework, what did you find with respect to
16 merger specificity for the administrative labor
17 efficiencies?

18 A. So as I said, it is typical, I think, when firms merge,
19 to at least contemplate the possibility that the merger will
20 make certain positions redundant.

21 I think, for instance, of the CEO. Each firm has one
22 now. After the transaction, it is likely almost certain
23 that they will only need one CEO, and therefore one of those
24 two titles can be eliminated in that process, and there
25 would be some savings to the firm generated as a result of

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1 that elimination.

2 Because the positions, at least in concept, are
3 redundant, made redundant by the merger, the efficiency
4 would be considered merger-specific.

5 Q. And can you give us an example to support your
6 conclusion of -- a little more detail on your conclusion on
7 merger specificity?

8 A. Yes. As I said, I think that the example of senior
9 executives, with duplicative titles across the, you know,
10 CEO -- two CEOs or two chief legal officers, would be an
11 example of a position that would be made redundant by the
12 merger and could be eliminated.

13 Q. Moving on to the second prong of the framework, what
14 did you find with respect to verifiability in this category
15 of administrative labor?

16 A. So I want to separate the discussion for the two
17 estimates, and I'll start with the low end.

18 The low-end estimate that was provided by Mr. Gokhale,
19 I collected the same data that he used from public SEC
20 filings to establish the compensation of certain senior
21 executives by title and compared the titles across the two
22 companies to confirm their duplicativeness.

23 As I said, this is an efficient -- I'm sorry this is --
24 the elimination of this redundancy is common in mergers, and
25 it was reasonable to expect they would eliminate at least

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1 one of those positions; and, therefore, that the low-end
2 estimate was verifiable.

3 Q. Turning to the high-end estimate, can you describe what
4 that estimate is?

5 A. So the high-end estimate is a little bit different. It
6 concerns a much larger population of employees, and the
7 redundancies are not as obvious from their titles.

8 So you can imagine the firm combining its legal
9 operations, but it isn't -- but, of course, the scale of
10 those operations also increases with the size of the
11 company, and so it isn't as clear that you can just lay off
12 half of the lawyers. That means you've got to do some
13 different analysis or some different arithmetic to produce
14 the efficiency expert -- the efficiencies estimate.

15 I examined the data that the parties produced with
16 salaries and matched across Albertsons and Krogers. I
17 didn't identify any problems with the data or the matching
18 included there. Where I had concerns was with regard to how
19 that led to an estimated amount of savings.

20 That was derived from a database from the consulting
21 group, Boston Consulting Group. That is proprietary to
22 them, and we had no visibility into that database. It was
23 unclear how the efficiency benchmark used for that
24 calculation was calculated or how appropriate it would be
25 for these companies.

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1 And so on that basis, I found the high-end estimate to
2 be not verifiable.

3 Q. How does your assessment on the high end differ from
4 Mr. Gokhale's with respect to verifiability?

5 A. Mr. Gokhale found this to be verifiable, the high end
6 to be verifiable. He accepted the use of the benchmark from
7 BCG for that calculation.

8 Q. Let's turn now to another category, the sourcing cost
9 efficiency category.

10 Is there an example from this category that -- where
11 you found that claimed cost synergies were not
12 merger-specific and verify -- not verifiable?

13 A. I would focus us on the example of the national brands
14 sourcing category. I think we've heard a fair amount about
15 this in the trial, or I have in the opportunities that I've
16 had to be here, and I think there's a similar slide that we
17 might use to walk through that.

18 Q. Yes.

19 MS. BALBACH: And this slide should be kept on the
20 private screens as it contains confidential information. So
21 we can go there.

22 BY MS. BALBACH: (Continuing):

23 Q. What are national brands?

24 A. National brands are large consumer packaged goods
25 companies, often called CPGs, from which the parties

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1 purchase branded products for resale in their stores.

2 So these would be companies like Kraft or General
3 Mills, Pepsi, or Smucker, and those are the kinds of
4 companies and products at issue.

5 Q. And, just briefly, what is included in the Kroger
6 national brand sourcing claims?

7 A. So the parties expect that, after the merger, they'll
8 be able to use their awareness of the difference in prices
9 that the two parties observe in their data to negotiate
10 lower prices with those CPGs.

11 Q. Overall, what did you find with respect to the
12 verifiability of the national brand sourcing efficiency?

13 A. So I found that the data that the parties produced that
14 matched products across the two companies -- Kroger and
15 Albertsons -- which came from, I understand, as part of
16 their clean room and was used by their consultants to do
17 that matching, was accurate. I didn't identify any flaws or
18 problems in those data.

19 That gets you to what the parties refer to as "the
20 gross variance," just the gross difference in what the two
21 parties pay after -- at the end of the day for a particular
22 matched product.

23 However, it's important to get to what the parties call
24 the net variance. That's the part that I think is actually
25 at issue and up for grabs in future negotiations, and there

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1 I found there to be several unsupported assumptions that I
2 couldn't verify, and therefore I considered the estimate to
3 be unverifiable.

4 Q. And I believe you have a slide that depicts these
5 concepts which we'll keep up on the private screen.

6 Again, I caution you this contains nonpublic
7 information, so please don't reveal any of the numbers.

8 Okay. This is slide 9.

9 A. Yes.

10 Q. Where does this slide come from?

11 A. This is a slide -- I think Mr. Gokhale talked about
12 this slide as well. This is a slide from -- produced, as I
13 understand it, by Bain, the consulting firm that was used by
14 the parties to estimate the national brand sourcing
15 efficiencies, and it shows the assumptions and the steps
16 that were used to get from what the parties call "gross
17 variance" to net variance.

18 Q. Can you identify for us where gross variance is on this
19 slide?

20 A. Yes.

21 The left-hand-most column of the chart, the largest
22 column, that's what they call the gross variance, and that's
23 just the sum of the differences in what the two parties paid
24 for a given consumer packaged goods product matched SKU
25 across that range of matched SKUs. So it's kind of the

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1 total amount of difference across a universe of matched
2 SKUs.

3 Q. And can you identify where "net variance" appears on
4 this slide?

5 A. Yes. Net variance is in the far right column. That's
6 the shortest of the columns. And that is -- it takes the
7 gross variance number, makes several adjustments to it, and
8 that's the amount, as I understand it, that the parties view
9 will be available to be negotiated with the consumer
10 packaged goods companies.

11 Q. Is there a difference between gross and net variance?

12 A. There is.

13 Q. Why is the difference important?

14 A. Yes. The difference is important because all of the --
15 as I think everyone in the case agrees, that the gross
16 variance is not the amount that they could negotiate with
17 the CPGs. And the reason is because a large portion of the
18 parties' pricing, or the pricing that the parties receive,
19 is due to the manner in which they merchandise and promote
20 their products.

21 So they make agreements about how to use shelf space,
22 end caps, discounting with the parties, and have access to
23 lower prices sometimes as a result, but those would be --
24 those are meant to be held constant in the analysis, and the
25 expectation -- and the point is to identify the portion of

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1 the gross variance that you could -- that represents what I
2 think at one point they called "the true difference." The
3 amount that they could then negotiate with the CPGs.

4 Q. I'd like you to walk us now through how Bain gets from
5 gross variance to net variance.

6 Let's start with the second bar on this chart. What's
7 depicted in the second bar?

8 A. So the second bar represents an adjustment for the
9 planned divestiture, and they basically take a 10 percent
10 haircut on the first number.

11 That's the 10 -- excuse me. I know I'm not supposed to
12 reference numbers. I apologize. That represents a 10
13 percent haircut on the first number.

14 Q. And what's depicted in the third bar?

15 Cautioning you, again, not to reveal any --

16 A. Thank you very much. I apologize.

17 The third bar represents a further haircut for the
18 expectation that they will start with the largest CPGs and
19 expect to resolve those negotiations within two years, so
20 they exclude any differences that they might negotiate after
21 that.

22 Q. And what's depicted in the fourth bar here?

23 A. The fourth bar is just a subtotal. So it's really just
24 the first bar adjusting for the next two bars. You can see
25 it's sort of -- that bar stops at the bottom of the second

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1 bar level.

2 Consultants often refer to this as a "waterfall chart."

3 Q. And what's in the fifth bar?

4 A. The fifth bar is probably the most important one.

5 They -- I think Mr. Gokhale referred to this as "adjusting
6 for potential contingencies."

7 The important thing here is, again, everyone agrees
8 that a lot of the difference in the prices paid are due to
9 choices that the parties make about how to merchandise and
10 promote their products, and they need to control for that in
11 the analysis to understand what's truly up for grabs, and so
12 they do some -- they make some assumptions in order to
13 deduct some portion of the gross variance in the fifth
14 column.

15 Q. I'm going to ask you about -- you mentioned
16 contingencies. So let's go to the next slide.

17 MS. BALBACH: It should stay on the private
18 screens.

19 BY MS. BALBACH: (Continuing):

20 Q. And I'll remind you it contains confidential
21 information, confidential numbers, so I caution you not to
22 reveal the numbers.

23 So looking at slide 10, how did Bain adjust for
24 contingencies?

25 A. So Bain identifies differences in the promotional

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1 activity and the merchandising activity of the two
2 companies, based on shelf space and promotional activity,
3 and then they assign realization rates based on those
4 differences.

5 And these figures, in Mr. Gokhale's table, are those
6 realization rates.

7 Q. What is the basis for the percentages on this chart?

8 A. I understand that they come from the consulting firm
9 Bain. Other than that, we don't have any information. I
10 didn't receive any information that explains how they were
11 calculated or whether they came from some other data set.

12 Q. So what happens if you change one of these percentages?

13 And I think you have another slide here.

14 MS. BALBACH: Again, this has confidential
15 information, so we'll keep it on the private screens.

16 THE WITNESS: So that was the question I was
17 interested in as well. And so I did a robustness check to
18 see how important the inputs were to the calculation.

19 I took one of them, the assumption or the expectation
20 that they will capture a substantial amount of the
21 promotional dollars in realization rates, and I asked the
22 question: What would the net efficiency -- net variance, I
23 should say, be if we assume they can't capture those dollars
24 at all?

25 And I found that that reduced the estimate by about a

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1 third.

2 BY MS. BALBACH: (Continuing):

3 Q. Let's go back to the chart. I think you identified it
4 as a waterfall chart and the process for getting from gross
5 variance to net variance.

6 MS. BALBACH: Again, still on the private screen.

7 BY MS. BLACKBURN: (Continuing):

8 Q. In your opinion, is the net variance shown here the
9 total national brand sourcing efficiency?

10 A. I would not expect so.

11 The parties' methodology suggests that, once you
12 control for differences in merchandising and promotion,
13 what's left is the difference that can then be negotiated
14 with CPGs.

15 So my understanding is that's the part -- that's the
16 starting point of those negotiations, and that's the part
17 that's up for grabs, but I wouldn't necessarily expect that
18 they would fully realize that, that estimate, in those
19 negotiations because they still have to get the CPGs to
20 agree.

21 Q. In preparing your expert report, did you review other
22 Bain documents that inform your understanding of what the
23 net variance represents? I think you have a slide. I'll
24 caution you, it's got private information.

25 A. I did. I reviewed the deposition of Mr. Noland, I

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1 believe.

2 Q. Was that Mr. Roland?

3 A. Roland. Thank you for that reminder. From Bain
4 Consulting.

5 And I believe this presentation was an exhibit in that
6 deposition, and it is a sort of prior version of the
7 analysis we just looked at.

8 Q. Can you tell us what this slide 13 shows?

9 A. Yes.

10 What I noted about this slide is the reference in the
11 middle panel, and that there's another reference in the
12 right panel as well, to the -- the amount shown here, which
13 is the -- in this analysis, is the net variance, and it's
14 referred to as the opportunity, which, I think, indicates
15 that the parties expect that that's the opportunity over
16 which they can negotiate with the CPGs, but that's the sense
17 in which I think there's still negotiation that could affect
18 the total in the end.

19 Q. Why does all of this lead you to conclude that the
20 national brand cost sourcing -- or sourcing cost efficiency
21 is not verifiable?

22 A. So, effectively, we have, sort of, two -- two parts to
23 the analysis. The part -- the process of getting from the
24 gross variance to the net variance, that involves several
25 assumptions that aren't supported.

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1 And then the fact that the analysis results in the net
2 variance still doesn't resolve the question of what the --
3 how much of that will be realized in further negotiations.

4 Q. Turning to the second prong of the efficiencies
5 analysis, the prong of merger specificity, remind us what
6 Mr. Gokhale found with respect to merger specificity for the
7 national brand sourcing efficiency.

8 A. Yes. So Mr. Gokhale concludes that the national brand
9 sourcing efficiency and all, as I understand it, the other
10 sourcing efficiencies as well, are merger-specific because
11 of what he calls "price discovery," which I would understand
12 to mean that the knowledge by the parties of what the other
13 party paid for those products is sufficient to explain or to
14 command the entirety of that difference in further
15 negotiations.

16 Q. And looking at slide 14 again -- it's a confidential
17 slide -- what did you conclude with respect to merger
18 specificity for the national brand sourcing claims?

19 A. So I conclude that the -- that price discovery alone is
20 not sufficient to expect that the parties will command that
21 full difference in further negotiations, and as a result,
22 the estimate they provided is not merger-specific.

23 Q. And how did you reach that conclusion?

24 A. I reviewed testimony from the -- from third-party CPG
25 representatives in the case, and that testimony indicates

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1 that, from their perspective, most of the difference is, in
2 fact, explained by differences in merchandising and
3 promotion, which indicates that at -- at -- to start, the
4 net variance is in dispute in the case, and I would expect,
5 in negotiations, the CPGs would push back and make that
6 argument.

7 Furthermore, I think that the parties have not shown
8 any special capability and a unique capability that one
9 party brings to negotiating that the other party doesn't
10 have, and as a result, I conclude that it's not
11 merger-specific.

12 Q. Can you give an example of such supplier testimony?

13 A. Yes. I was in the courtroom when Mr. Crane, from
14 Smucker, testified; and I heard him testify -- I think this
15 is consistent with what said in his deposition as well --
16 that the pricing options to which Kroger and Albertsons have
17 access are the same and that the primary -- the differences
18 are explained by the differences in how they choose to use
19 those options to merchandise their products.

20 It's, of course, possible that Kroger could do -- could
21 choose to merchandise like Albertsons and vice versa, but
22 they can't do both. They can't both merchandise like Kroger
23 and merchandise like Albertsons because there are
24 limitations in their shelf space and in the amount of space
25 they can -- space of various kinds they dedicated to

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1 promotion.

2 MS. BALBACH: And we can advance to the next
3 slide, keeping this on the private screens.

4 BY MS. BALBACH: (Continuing):

5 Q. And I would caution you, Mr. Yeater, not to mention
6 specific names in testimony here, but is there other
7 evidence from suppliers that you considered in your -- the
8 opinions in your report?

9 A. Yes.

10 My review of the declarations provided by some of the
11 other CPGs is consistent with the testimony that I heard
12 from Mr. Crane.

13 There are clear differences in what the parties pay for
14 sure. That's that gross variance. And I don't think that's
15 in dispute, but I think that most of the parties -- most of
16 the CPGs described pricing that would suggest that the
17 differences are explained by merchandising and promotion and
18 that they wouldn't be subject to further negotiation.

19 It's certainly possible that negotiations would
20 commence and that the parties would have different views of
21 that, but I think that's exactly why it's important to think
22 of the net variance as the starting point for further
23 negotiations.

24 Q. And so it's clear, why does the supplier testimony
25 matter to your opinions that you reached on national brand

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1 sourcing?

2 A. Well, again, I think it both goes to verifiability and
3 merger specificity. I think that the estimate is -- fails
4 to consider the extent or the result of further
5 negotiations, and I also think that the parties -- the CPG
6 testimony indicates that the -- that that price discovery
7 would not be sufficient to expect that the -- that Kroger
8 and Albertsons would command that full difference in further
9 negotiation.

10 Q. And how would all of this affect negotiations, in your
11 opinion, between Kroger and its suppliers?

12 A. I think you could imagine -- I think you can imagine
13 Kroger and Albertsons seeking to negotiate lower prices on
14 the basis of what they're -- what they learn from price
15 discovery, if we use that term.

16 But, again, I think that that isn't -- but I would
17 expect that the CPGs would push back. They're sophisticated
18 negotiators. They understand the parties well. And I think
19 that their testimony indicates that they don't expect any
20 changes after the merger. And as a result, it's not clear
21 that the net variance -- how much of the net variance would
22 be realized in those negotiations.

23 Q. And I think you said, "They wouldn't expect any changes
24 after the merger."

25 Who is the "they"?

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1 A. I'm sorry. I should -- shouldn't use pronouns.

2 The CPGs did not expect that the terms of their
3 negotiations would change due to the fact that Albert's --
4 Albertsons and Krogers had merged.

5 Q. So, in summary, is price discovery sufficient for this
6 efficiency to be merger-specific?

7 A. Not in my opinion.

8 Q. Now let's turn to the last major category of cost
9 efficiencies.

10 Do you have an example of your analysis that you can
11 walk us through in the supply chain and manufacturing area?

12 A. Yes. I would focus on the category of -- that the
13 parties refer to as "own more transportation."

14 That category involves -- well, I'll say that that's a
15 category that Mr. Gokhale found to be verifiable and
16 merger-specific and is part of the supply chain and
17 manufacturing broad category of efficiencies.

18 Q. And you have a slide on this. Slide 17.

19 Again, this is a confidential slide, but looking at
20 that this slide, what's included in the "own more
21 transportation" cost efficiency claims?

22 A. The "own more transportation" cost efficiency claims
23 refer to the parties' ability to manage more of the
24 transportation of their goods from vendors themselves rather
25 than having the vendors manage that transportation.

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1 And Kroger has increasingly managed more of it
2 themselves and believes that that will be more efficient,
3 and they have -- the efficiency concerns the extent to which
4 that -- that savings could occur for Albertsons as well.

5 Q. Overall, what did you find with respect to
6 verifiability and merger specificity for the "own more
7 transportation" efficiencies?

8 A. So I found these efficiencies to be neither verifiable
9 nor merger-specific.

10 Q. How did you determine that these "own more
11 transportation" efficiencies were not verifiable?

12 A. So this -- efficiency is primarily estimated from a
13 spreadsheet, which I understand for -- I believe Kroger
14 executives -- former Kroger executives produced or
15 contributed to, and that spreadsheet includes volumes of
16 goods that are shipped, both through this self-managed
17 channel and through vendor-managed channels, for both
18 companies, and also -- and estimates the amount that would
19 be shifted over for -- for Albertsons.

20 And the data -- again, I examined the data to confirm
21 that it appears accurate. There aren't any obvious flaws in
22 those data.

23 The critical assumption is the amount of savings that
24 will occur as a result of shifting those volumes over.
25 That's a number in the spreadsheet. Again, that doesn't

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1 appear to have any support. It didn't -- it doesn't --
2 there's no data to back it up. I can't trace it back to
3 anything.

4 Q. Can you provide some more detail on what that
5 unsupported assumption was?

6 A. Well, again, the parties assume that there's a
7 percentage savings that -- that they will generate from
8 shifting volumes over, essentially a certain percentage of
9 the cost of vendor-managed transportation will be lower as a
10 result of the -- of shifting it into own managed
11 transportation. That number is a -- is a percentage on the
12 spreadsheet, but it doesn't appear to have any backup, as we
13 would say.

14 And so I can't trace it back to anything, in
15 particular.

16 And I particularly can't evaluate the extent to which
17 the number, which may come from Kroger's experience, would
18 be relevant to Albertsons' experience.

19 Q. What did Mr. Gokhale conclude about whether this
20 category was merger-specific?

21 A. He concluded that it was verifiable and
22 merger-specific.

23 Q. And just to recap, how did you determine that the
24 claimed efficiencies were not merger-specific?

25 A. So Mr. Gokhale concludes that this efficiency is

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1 merger-specific, if I understood his testimony, because
2 Albertsons does not currently have plans to make that same
3 transition.

4 There are -- to me, that was not sufficient to
5 determine that the efficiency was merger-specific.

6 Q. Have you seen or heard any other testimony or evidence
7 in this matter that goes to your opinion about merger
8 specificity?

9 A. Yes. The factors that I considered in determining that
10 the -- that Albertsons' current plans were not sufficient
11 were, I think, three in number.

12 First, while -- well, first, Kroger had -- undertook
13 the decision to move its transportation management more
14 in-house a couple of years ago and made the transition to
15 its current levels over that period.

16 It's -- so, you know, there -- there wasn't any
17 evidence provided that would suggest that there was a
18 substantial barrier to Albertsons making the same transition
19 over that period.

20 Secondly, I noted that -- I think Mr. Sankaran has
21 testified that they're always considering, and, in fact,
22 evaluating, opportunities for efficiencies, including
23 efficiencies in transportation, and he didn't note any
24 barriers that would prevent them from making the necessary
25 investments to -- to achieve what Kroger has achieved

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1 unilaterally.

2 But I think the final factor is that -- and probably
3 the most important one -- is that in at least one category
4 of products, the fresh produce category, Albertsons already
5 manages more of its own transportation than what Kroger
6 does.

7 And so it didn't seem reasonable, to me, to conclude
8 that it would not be possible for Albertsons to -- to shift
9 more of its transportation in-house.

10 Q. You just said: It didn't seem reasonable for me to
11 conclude that it would not be possible for Albertsons to
12 shift more of its transportation in-house.

13 Did anybody make that assumption?

14 A. Again, I think Mr. Gokhale concluded that this was
15 merger-specific because they didn't have plans to do so;
16 and, in my analysis, I wanted to -- I wanted to consider the
17 possibility that they -- that those means were available to
18 them and that there weren't any barriers that would prevent
19 them from doing so.

20 Q. Okay. We can move on to slide 18 and return to the
21 summary of your opinions in this matter.

22 What was your third opinion?

23 A. My third opinion was to note that the claimed cost
24 efficiencies -- and this would include the parties' proposed
25 cost efficiencies, the amounts that Mr. Gokhale concluded

Yeater - D

1 were verifiable and merger-specific and my own, all
2 represent a small share of the firm's combined operating
3 costs and, therefore, would represent a small decrease in
4 those operating costs after the merger.

5 Q. And you have a slide on this. So we can go to slide
6 19.

7 MS. BALBACH: Again, this should remain on the
8 private screens.

9 BY MS. BALBACH: (Continuing):

10 Q. So, Mr. Yeater, how did you come to your conclusion?

11 A. The arithmetic is relatively simple. I combined the
12 operating costs of Kroger and Albertsons from their most
13 recent complete financial statements to determine the
14 numerator of the -- sorry -- the denominator of the
15 calculation, and then I simply compared that to each of the
16 parties' estimated -- or -- sorry -- each of the estimates
17 of the parties' cost efficiencies, and is displayed on the
18 slide. They're all a small share of that larger operating
19 cost number.

20 Q. And why does it matter that efficiencies are small
21 relative to cost?

22 A. Well, returning to the sort of purpose of efficiencies
23 analysis in merger analysis, it's important to consider
24 whether the efficiencies would sufficiently offset whatever
25 harm may be found in -- from the transaction and the

Yeater - D

1 elimination of a competitor.

2 My understanding, from Mr. Hill-- sorry -- Dr. Hill's
3 testimony and from his expert report, is that this level of
4 cost reduction would be -- would not be sufficient to offset
5 the competitive harm that he found.

6 MS. BALBACH: Your Honor, I want to follow up on
7 an objection my colleague, Mr. Wolf, made during the price
8 investment testimony.

9 May we approach with a copy of the transcript to which
10 Mr. Yeater was referring when he talked about hearing
11 Mr. Aitken's testimony in court?

12 MR. WOLF: The trial transcript?

13 MS. BALBACH: The trial transcript, yes.

14 MR. WOLF: Can I -- I'm happy to look at it if
15 there's --

16 THE COURT: So I'll allow you to confer, and then
17 you'll make a decision whether you want to --

18 MS. BALBACH: Thank you, Your Honor.

19 THE COURT: -- offer it.

20 MR. WOLF: You can ask this question. This is
21 different than what you stated, but this is fine, if you
22 want to ask that question.

23 MS. BALBACH: Okay.

24 MR. WOLF: No objection to the question. You can
25 ask the question.

Yeater - D

1 MS. BALBACH: So do we approach the witness with
2 the transcript?

3 MR. WOLF: You could just ask him if he heard it.

4 MS. BALBACH: Okay.

5 MR. WOLF: That's fine with me.

6 BY MS. BALBACH: (Continuing):

7 Q. Mr. Yeater, you were in the courtroom for Mr. Aitken's
8 testimony; is that correct?

9 A. Yes.

10 Q. I was.

11 And did you hear the question: One reason they may do
12 this is because Kroger as a whole may not want to spend the
13 money. Is that fair?

14 And Mr. Aitken replied: That's correct.

15 Question: For example, Kroger may not spend all its
16 priced investment funds to help Kroger achieve targeted
17 earnings per share for a quarter; is that right?

18 That's correct.

19 And a question: And Kroger has, in fact, decided not
20 to invest everything it had planned in order to meet certain
21 earnings per share targets in the past; is that right?

22 Answer: That's correct too.

23 Is that the testimony you heard and you were referring
24 to in your testimony on price investments?

25 A. Yes, it was.

Yeater - X

1 MS. BALBACH: I have nothing. I pass the witness.

2 MR. WOLF: Thank you.

3 THE COURT: All right.

4 Go ahead.

5

6

CROSS-EXAMINATION

7 BY MR. WOLF:

8 Q. Good morning, Mr. Yeater.

9 A. Good morning.

10 Q. Pleasure to see you again.

11 A. Good to see you too.

12 Q. I want to start by discussing your background for a few
13 minutes.

14 As you heard in my objection, we have no dispute that
15 you are a heavily credentialed individual with an impressive
16 background, but I'd like to investigate some of your
17 connections to the issues particular to this case.

18 You've never worked in the grocery industry; right?

19 A. I have never worked in the grocery industry, no.

20 Q. And excluding this case, you have never, under your own
21 signature, given an opinion in a legal proceeding regarding
22 issues attendant to efficiencies; right?

23 A. That's right. Yes.

24 Q. This is the first time?

25 A. Yep.

Yeater - X

1 Q. You never testified at trial about efficiencies; right?

2 A. No. I don't think efficiencies were part of my prior
3 trial testimony.

4 Q. And you haven't taught any classes on efficiencies?

5 A. As I mentioned, I was a teaching assistant in the
6 course I referred to, and I think efficiencies were
7 certainly part of the discussion; but to be clear, Fiona was
8 the teacher and not me.

9 Q. And you've not authored any textbooks on efficiencies
10 or chapters of textbooks; right?

11 A. No.

12 Q. Shifting slightly, you've never advised an active
13 merger transaction like the one here; right?

14 A. No. I think that's correct, yes.

15 Q. And you've never built a financial model for an active
16 merger transition, like the one here; right?

17 A. That's -- I've never built a financial model for the
18 purpose of advising parties to the -- to that transaction,
19 correct.

20 Q. And you're not a certified public accountant?

21 A. I am not.

22 Q. And you've never conducted an audit?

23 A. Not as that term is used with regard to CPAs. That's
24 correct.

25 Q. All right. Let's walk through your slides, and we'll

Yeater - X

1 go one by one, and that way I make sure I don't go beyond
2 the scope of your testimony.

3 MR. WOLF: If we could call up the confidential
4 slide 2.

5 BY MR. WOLF: (Continuing):

6 Q. You have the summary slide, but let's go to the
7 substantive slide. Slide 2.

8 You quote Harris Teeter there: Just to be clear, you
9 do not dispute that gross margins declined at Harris Teeter
10 roughly 2 percent from 2014 to 2021; right?

11 A. I think it's 1.8; but, yes, I wouldn't dispute that
12 that's the amount in shown in both the demonstrative that
13 I've seen and also, I think, that merger reanalysis.

14 Q. And it's 1.87, I think is the number?

15 A. That might be right.

16 Q. You don't provide any different calculation?

17 A. No.

18 Q. And that represents \$130 million returned to customers;
19 right?

20 A. That represents -- it may represent \$130 million. I'd
21 have to go back to the base to confirm, but that may
22 represent 130 million.

23 Q. You recall the slide shown in this court about the
24 Harris Teeter merger?

25 A. I recall a slide. I want to make sure I'm remembering

Yeater - X

1 the right slide.

2 Is there --

3 Q. It doesn't need to be a memory quiz. You didn't
4 challenge the math of those folks talking about the Harris
5 Teeter price investment; right?

6 A. No.

7 Q. You talked about one reason for that being mix -- that
8 the possible change of mix -- wasn't the whole point of your
9 testimony regarding Harris Teeter that they didn't want to
10 change?

11 A. Well, I understand the -- I guess I -- I can -- there
12 are two points here. I understand the -- the merger
13 reanalysis to say that the management of Harris Teeter did
14 not want or plan to make price investments, and I think that
15 the document suggests or indicates that the reason is
16 because they considered that to be the right move in that
17 competitive environment, but I didn't see anything, at least
18 to my eye, that suggested that management didn't want to
19 change mix of product. Maybe that -- maybe you can refresh
20 me.

21 Q. You've seen no evidence whatsoever that there was a
22 change of mix of products; right?

23 A. That's right. I think Mr. Aitken testified that his
24 view was that there had not been.

25 Q. Right. So that hypothetical reason why the margin went

Yeater - X

1 down and customer savings, we can take that hypothetical
2 reason off the table based on the evidence you've seen in
3 this case; right?

4 A. Well, the -- that reason -- though I think it's
5 important to note that that's the -- if I understand
6 Mr. Aitken's testimony, that's the products they put on the
7 shelf. I still think there's an important question of
8 whether the mix of products purchased had changed.

9 Q. You didn't even try to answer that question; right?

10 A. Again, the purpose of my -- my -- my -- or I guess the
11 purpose -- my opinion was simply that we can't infer from
12 the changing gross margin that there was a decrease in
13 prices.

14 Q. And, similarly, at Roundy's, which you talked about --
15 and since we're talking about precision, let's be precise --
16 from 2016 to 2022, margin declined 1.97 percent; right?

17 A. That sounds correct, yes.

18 Q. And you don't dispute the math that that corresponds to
19 to \$106 million returned to customers; right?

20 A. That -- I remember the total dollar figure being about
21 105, yes.

22 Q. So we can -- you don't challenge in any way the
23 percentages or the absolute dollars of price investment
24 that's been testified to in this court in the Harris Teeter
25 or Roundy's mergers that occurred in the last 10 years;

Yeater - X

1 right?

2 A. I don't -- I certainly don't challenge that the data
3 show an erosion of gross margin. That's correct.

4 Q. And, in any event, you didn't testify today, nor do you
5 say in your reports, that you have an opinion that Kroger
6 does not intend to make the price investment that's been
7 talked about in this case; right?

8 A. I have no opinion about their intentions. That's
9 correct.

10 Q. And you would agree that Kroger can support its price
11 investment commitment with synergies that are not cognizable
12 under the merger guidelines; right?

13 A. I think Kroger can use dollars it has for price
14 investment, which could include -- they could come from
15 synergies. Certainly.

16 Q. So if it saves money as a result of the merger, but
17 because they don't fit the merger guidelines requirement,
18 for example, of merger specificity, that's real dollars in
19 the real world that can really go back to consumers; right?

20 A. If they achieve savings -- if they achieve savings,
21 they could use those in a variety of different ways,
22 including strategies around pricing. It's also possible
23 that they could increase some prices and use those dollars.

24 So I think that's the -- that's the nature of strategic
25 decision.

Yeater - X

1 Q. But specific to your opinion, I just want to make this
2 abundantly clear: Whether or not something is, for example,
3 merger-specific, as that legal term is defined in the merger
4 guidelines, is irrelevant to whether real dollars are really
5 saved in the real world; right?

6 A. Is -- I -- yes. I -- I think -- I think that's
7 correct. I guess I'm struggling a little bit with the
8 question, but I think the question of whether ultimately
9 they will save dollars or make dollars is sort of an ex-post
10 question, and that necessarily wouldn't be the question we'd
11 assess via the merger guidelines.

12 MR. WOLF: All right. Let's now shift to slide 6.

13 Again, confidential.

14 BY MR. WOLF: (Continuing):

15 Q. I think you made this clear, but you didn't analyze
16 revenue synergies; right?

17 A. That's correct. I mean, I think I -- I'm trying to
18 recall exactly my expert report.

19 In the case of the alternative profit streams, I
20 offered the opinions I think I described here; but, for the
21 most part, Mr. Gokhale had concluded that those are not
22 merger-specific or verifiable, and because they weren't cost
23 efficiencies, I didn't take the analysis further.

24 Q. Right. So we're clear, there are two ways -- or at
25 least two ways a merger can make more available -- more

Yeater - X

1 money available for investments. You can save money and
2 reduce costs or you can increase revenue. And either way,
3 it's a bigger pool of money to make the investments you need
4 for your business; right?

5 A. It is. Yeah, if you -- if you're able to increase the
6 amount of money that you have, you can invest some of it.
7 Definitely.

8 Q. And you didn't analyze half of that. You didn't
9 analyze the part of making more money; right?

10 A. Well, again, my analysis was to address the questions
11 as part of the merger guidelines, and so, as I described, I
12 think the revenue efficiencies -- or the revenue
13 synergies -- excuse me -- you know, weren't -- weren't a
14 part of that analysis.

15 Q. True or false: There was no analysis in your report of
16 the magnitude of the proposed revenue synergy and
17 alternative profit streams?

18 A. That is -- that is true.

19 MR. WOLF: So let's go to the next slide. 6?

20 BY MR. WOLF: (Continuing):

21 Q. You -- this is about saving money from duplicating
22 labor; right? Loosely speaking?

23 A. Right.

24 Q. And you agree with Mr. Gokhale on some issues and
25 disagree on others; right?

Yeater - X

1 A. Yes.

2 Q. And I think you said you were skeptical of his high end
3 because of Boston Consulting Group's analysis that was,
4 quote, "proprietary to BCG."

5 Did I get that right?

6 A. I think what I said is that the input is essential to
7 the calculation and that I can't evaluate its
8 appropriateness because we don't have access to the data.

9 Q. So, to be clear, we don't have access to the data, but
10 you could have gotten access to the data; right?

11 A. I'm not -- I'm not sure. I'm not sure what you mean by
12 that.

13 Q. Well, Boston Consulting Group's deposition was taken in
14 the case; right?

15 A. (No audible response.)

16 Q. And subpoenas were served on Boston Consulting Group;
17 right?

18 A. Correct.

19 Q. Just to be clear, nowhere in your report do you say
20 that you asked for information from Boston Consulting Group
21 that you weren't able to get your hands on. That's nowhere
22 in your report; right?

23 A. I think in my report I described the fact that I didn't
24 have access to these data, but I don't think I said
25 explicitly the sentence that you're mentioning.

Yeater - X

1 Q. No, no. We agree you didn't have access to it. I'm
2 trying to get at whether you didn't have access to it
3 because you didn't ask for it.

4 Did you ask anybody, "I'd like to see it," and they
5 said you can't see it?

6 A. I wanted all of the information used to produce the
7 estimates here, and I certainly asked for -- to receive
8 everything I could have access to to evaluate those
9 calculations.

10 Q. So just to be clear, you asked, from counsel, to get
11 access to the BCG proprietary information, and they didn't
12 provide it to you?

13 A. I asked to receive all the information that was used to
14 produce the calculation. I don't recall any specific
15 conversation in which someone refused to provide it to me.

16 Q. Let's go to the next slide. This goes to national
17 brand sourcing. This is a big chunk of money we're talking
18 about here; right?

19 A. Correct.

20 Q. And the way this works is -- and we'll set the stage.
21 Kroger and Albertsons can't swap money -- information today
22 about their pricing; right?

23 A. Correct.

24 Q. They have contracts to prevent them from doing that?

25 A. I would expect that to be true. I haven't seen those

Yeater - X

1 contracts.

2 Q. And, in fact, some activity related to that could be
3 illegal if they were to coordinate pricing; right?

4 A. You could certainly imagine that being a problem.

5 Q. So in any merger like this, a clean room is set up;
6 right?

7 A. Yes.

8 Q. And what happens is Kroger dumps their information in
9 the clean room and Albertsons dumps their information in the
10 clean room; is that right?

11 A. That's my general understanding.

12 Q. And when we say "clean room," that's a metaphor. It
13 used to be an actual room. Now it's a database; right?

14 A. Right.

15 Q. And so they put all their sensitive information in, and
16 then you hire a third party that's not a competitive
17 decision-maker for either, and say, "All right. You got to
18 work with this data." Right?

19 A. That sounds like the assignment they were given, yes.

20 Q. And in this case, that third party for this particular
21 project was a company called Bain; right?

22 A. Correct.

23 Q. And Bain is a global consulting service; right?

24 A. Correct.

25 Q. One of the top in the world?

Yeater - X

1 A. I would think they're highly ranked, yes.

2 Q. And Bain does this all the time; right?

3 A. They certainly worked on behalf of merging parties all
4 the time, yes.

5 Q. And that's whether or not they're merging -- the merger
6 is challenged in court; right?

7 A. I don't know the frequency with which they do that, but
8 I assume that sometimes the merger is challenged and not so,
9 yes.

10 Q. Well, fair enough.

11 I want to ask a better question than that.

12 The analysis we're talking about here was not done for
13 purposes of the litigation. The parties want to know,
14 whether this deal makes sense or not, are there efficiencies
15 to be gained from the merger? Right?

16 A. I think that's what I heard Mr. Maharooof testify to, so
17 yes.

18 Q. And that's consistent with your experience; right? The
19 parties to mergers hire these third parties to understand in
20 the real world, "Do we think we're going to have savings or
21 not?"

22 A. Yeah, I think that's right.

23 Q. And so Bain went into this clean room, and they -- they
24 analyzed the data, and you talked about the numbers that you
25 disagreed with; right?

Yeater - X

1 A. The inputs to the calculation that I couldn't find
2 support for, correct.

3 Q. Right. Now, to be clear, you had access to the Bain
4 model; right?

5 A. Yes.

6 Q. And you had access to the Bain data; correct?

7 A. I certainly had access to the -- to the matched output
8 of SKUs. If that's what you mean by "the Bain data," I
9 think that's right.

10 Q. And nowhere in your report do you suggest that -- any
11 specific errors that Bain made; right?

12 A. That's right. I think my testimony was I reviewed that
13 and found it -- found the matching to be sound.

14 Q. You did not identify any inaccuracy in Bain's analysis
15 of the parties' relative product costs; right?

16 A. You mean aside from the matching in the data? You're
17 just saying that the cost -- did I? No. No, I did not.

18 Q. And insofar as Bain has calculated the total gross
19 variance in those costs, you also did identify any errors;
20 right?

21 A. I think that's fair, yes.

22 MR. WOLF: So let's look at the next slide.

23 Again -- so, yes, thank you.

24 BY MR. WOLF: (Continuing):

25 Q. You were looking at this chart; right?

Yeater - X

1 A. Yes.

2 Q. As an initial matter, you have not done any independent
3 analysis to determine whether a portion of the parties'
4 estimated national brand savings are likely; correct?

5 A. The guidelines wouldn't expect that; so, no, that's
6 correct.

7 Q. You don't offer an opinion whether it would be the
8 projected number on the screen or something less; right?

9 A. Sorry. It -- it is the final realized amount of the
10 efficiencies. I just want to make sure I'm --

11 Q. I'm trying to be careful not to talk about the specific
12 number.

13 A. It's a challenge, yes.

14 Q. Just -- let me just --

15 A. The right-most column? Is that a fair way to proceed?

16 Q. Yes.

17 A. I do not offer an opinion that -- of the amount of the
18 gross variance that they will ultimately be able to achieve.
19 Correct.

20 Q. And you talked a lot about CPG behavior, and we'll talk
21 about Smucker and Nestlé in a few minutes, but you have
22 never yourself negotiated a procurement contract with a
23 consumer packaged goods supplier; right?

24 A. I have not. That's correct.

25 Q. And nowhere in your report -- again, putting aside the

Yeater - X

1 declarations we're going to talk about in a minute -- do you
2 indicate that you talk to any expert on CPG negotiations;
3 correct?

4 A. I didn't talk to any -- obviously, I talked to my team
5 about this case, but I didn't reach outside of that team,
6 no.

7 Q. And so when you were saying what you thought CPGs would
8 or wouldn't do, was -- there is nothing in your report that
9 that is based on other than the declarations; correct?

10 A. I think it's based, in part, on the descriptions of the
11 expected negotiations that the parties put together, and
12 some of the supporting testimony that they offer is, I
13 think -- you know, as I said, it's consistent with the
14 notion that, ultimately, they will negotiate over this
15 amount, but the primary evidence I rely on is the -- is the
16 information that has come from the CPGs. I think that's
17 correct.

18 Q. The declarations?

19 A. The declarations, the testimony.

20 Q. So we're working in order through your slides. If I
21 had thought about this in advance, I'd have flipped the
22 slides and talked about the declarations, but we'll get to
23 them in a minute.

24 So let's turn to the next slide.

25 Now, Bain adjusted its national brands savings

Yeater - X

1 estimates to account for what it called meaningful
2 differences in merchandising and promotion decisions;
3 correct?

4 A. Correct.

5 Q. And you didn't perform an independent analysis of the
6 degrees of difference between the prices paid by the parties
7 and to what they are attributable; correct?

8 A. I did not separately estimate that. That's correct.

9 Q. And Mr. Gokhale explained in his report that the data,
10 quote, "Shows that Kroger and Albertsons have different base
11 and promotional funding rates for the same products and
12 receive different levels of funding for similar activities."

13 He testified to that and put that in his report; right?

14 A. That's his statement. I didn't see any additional
15 analysis by him that would -- that would go to that, so it
16 isn't clear to me if he's describing what the Bain analysis
17 is meant to capture or if that's a separate conclusion of
18 his.

19 Q. Well, either way, though, your rebuttal report does not
20 respond to that claim at all; correct?

21 A. I'd have to double-check my report. There may not be a
22 specific statement about that.

23 Q. Do you recall being asked that question in your
24 deposition?

25 A. I do not, unfortunately.

Yeater - X

1 Q. Well, I'm sure counsel will point out and redirect if
2 you do, in fact, respond to it, but do you have any reason,
3 sitting here today, to believe that you responded to
4 Mr. Gokhale's statement?

5 A. I can't think of a paragraph that addressed that
6 offhand.

7 Q. Okay. So let's go to the next slide.

8 You called this, I think, a robustness analysis; is
9 that right?

10 A. That's the term that I used here. Check or analysis.

11 Q. Is that the same thing as, like, a sensitivity check?

12 A. That's a fine word for it, yes.

13 Q. The assumption underlying this sensitivity is that the
14 parties will not realize any cost savings associated with
15 promotional funding; correct?

16 A. That's the assumption that I tested. Correct.

17 Q. And what that means is, when this merger happens, if it
18 does happen, and they compare: "All right. What does
19 Kroger get in promotional funding for Pepsi versus what
20 Albertsons does?" And when they do that for all of the
21 hundreds of thousands of SKUs with the hundreds of vendors,
22 this assumes that not once will they say, "Hey, wait a
23 second. You're getting a better deal than we are"?

24 A. I don't think that's what it assumes. I think they'll
25 find differences. The data show differences. I don't think

Yeater - X

1 that's controversial.

2 I think that what's unclear is whether the knowledge of
3 those differences will then result in capturing those
4 differences in negotiations.

5 Q. So we're right back to the CPG point we were talking
6 about a minute ago; right?

7 A. That's an important point.

8 Q. Nowhere in your report do you argue -- actually, let's
9 keep moving so we get to get to that.

10 But to be clear, this sensitivity analysis would only
11 apply in a world where Bain was completely wrong about
12 promotional funding; right?

13 A. It would -- it would apply. Yeah, I mean, if -- if --
14 again, it's meant to test the importance of the assumption;
15 but, certainly, if it were the case they were completely
16 wrong, then it would have a substantial effect on their
17 analysis, yes.

18 Q. But this assumes that they are completely wrong. I
19 mean, a sensitivity analysis is, like, "I know you do this
20 all the time, Bain. I know you do this in mergers and
21 litigation and not, but you are entirely wrong. You're not
22 going to get anything." That's what slide 10 is supposed to
23 reflect; right?

24 A. It asks the question how sensitive is the analysis to
25 that particular input, yes.

Yeater - X

1 Q. And to that, you testified -- and I think three or four
2 times you used the phrase "It didn't seem reasonable to me,"
3 and I want to unpack that a little bit.

4 When you say "seem reasonable," you, in your testimony
5 today, didn't mention any case or treatise or checklist or
6 any other objective measure that you applied when deciding
7 what was reasonable or not; right?

8 A. I think we'd have to -- well, it would be useful to
9 talk about a particular case and the way I may have used the
10 phrase. So I don't recall citing a treatise for that
11 purpose, but I think I was describing the logic of my
12 analysis.

13 Q. So when we're trying to decide how much weight we
14 should accord to what you, Mr. Yeater, find reasonable,
15 given that you've never testified to this issue before, you
16 authored nothing on this before, you taught nothing on this
17 before, I'd like to know, is there any objective standard
18 you used to define reasonableness? And just confirm for me
19 that nowhere did you tell Her Honor what objective standard
20 you use today.

21 A. The standards that I would use to assess that question
22 are derived from my experience and from my training in the
23 topics relevant to the questions here, and I think they're
24 appropriate to determine whether the assumptions are
25 reasonable.

Yeater - X

1 Q. All right. Now let's get to the promised CPG
2 discussion.

3 MR. WOLF: If we'd turn to slide -- the Smucker
4 slide, which is confident -- I guess it's not confidential.

5 BY MR. WOLF: (Continuing):

6 Q. This was the testimony --

7 MR. WOLF: Is this confidential? Is it? It is?
8 Oh, I'm sorry. Thank you.

9 No. This is in court. Thank you. Thank you. I
10 appreciate the double-check. Absolutely.

11 So this is not confidential, Mr. Rennick, but we
12 shortly will be getting to confidential.

13 BY MR. WOLF: (Continuing):

14 Q. So we heard in court Smucker; right?

15 A. Yes.

16 Q. And to be clear, you mentioned a number of companies in
17 your testimony: Smucker, Kraft, General Mills, Pepsi.

18 We haven't heard anything in court from Kraft; right?

19 A. No.

20 Q. We haven't heard anything in court from General Mills;
21 right?

22 A. Not that I recall, no.

23 Q. And we haven't heard anything in court from Pepsi;
24 right?

25 A. Not that I recall.

Yeater - X

1 Q. All right. So of the top, say, 20 suppliers, CPG
2 suppliers for Kroger and Albertsons, who have we heard from?

3 A. I want to be careful because I'm not 100 percent sure
4 which names I can mention.

5 MS. BALBACH: Your Honor?

6 THE COURT: Yes.

7 MS. BALBACH: The only CPG name that was public in
8 his testimony was Smucker, and I would caution us not to
9 talk about the other evidence that appeared on the slides.
10 That testimony is not public, and those CPGs are not -- more
11 importantly, those CPGs are not represented in court today
12 by their attorneys.

13 MR. WOLF: All right. Your Honor, I don't think I
14 asked a sensitive question, but I will phrase it just so
15 we're clear of the line.

16 THE COURT: Yes. Understood.

17 BY MR. WOLF: (Continuing):

18 Q. Let's focus on two companies: Smucker's and Nestlé.
19 Okay?

20 Let's talk about Smucker, which is on the screen, and
21 you have a -- pulled out a quote, "It would not affect the
22 trade fund's accrual rate."

23 What does the "it" refer to in that answer? Do you
24 recall?

25 A. I'd have to go back and check, but my recollection is

Yeater - X

1 that they were referring to selling more product would not
2 affect the rate at which trade funds were accrued but rather
3 just the total amount because you were selling more product.

4 Q. I think you're absolutely right.

5 And let me just clear this up. The question that led
6 to this answer was: Question: I think you would -- you
7 have kind of talked us through this. I want to ask you how
8 does the volume of product that a retailer is buying affect
9 the rate of trade fund that the customer might get back from
10 Smucker?

11 And so that's exactly what the "it" refers to; right?

12 A. Correct.

13 Q. So we all agree that, at least for this particular
14 vendor of CPGs, that volume isn't going to be affected by
15 the merger, that volume isn't going to bring more money.

16 But there was a lot more testimony that Smucker offered
17 in court, wasn't there?

18 A. There was, yes.

19 Q. You heard Mr. Crane testify that Smucker's pricing to
20 specific customers is competitively sensitive information.
21 Right?

22 A. I did hear that, yes.

23 Q. And that he also testified that disclosure of that
24 information would give Smucker's current and future
25 customers a significant advantage in negotiating future

Yeater - X

1 agreements with Smucker's; right?

2 A. That sounds like the quote that I heard, yes.

3 Q. And that is precisely the basis of Kroger's claim that
4 it's going to save money and efficiencies if this deal goes
5 through; right?

6 A. I think I said in my testimony and I certainly said it
7 in my report -- so if I didn't, I apologize -- that the --
8 that what Mr. Gokhale refers to as "price discovery" would
9 be valuable information. I think that testimony is -- is
10 consistent with that, but he also observed that there
11 were -- he did not -- he did not expect the merger to affect
12 the pricing options available to the customers.

13 Q. Smucker itself, in court, said that the minute that
14 Kroger learns what Albertsons gets, or vice versa, it
15 provides a significant advantage in negotiating future
16 agreements; right?

17 A. The "significant advantage" part I think I recall.

18 Q. And that is the heart of what we're talking about when
19 we're talking about national brand efficiencies, isn't it?

20 A. Certainly the parties' belief is that -- that having
21 that information will be to their advantage.

22 Q. All right. Let's -- I'd like to be careful now in what
23 we call up next.

24 I'm going to -- you showed on the private slide a --
25 one quote.

Yeater - X

1 MR. WOLF: Let's show slide 16 real quick just to
2 remind, on the private slide, what you -- what Nestlé said.

3 BY MR. WOLF: (Continuing):

4 Q. You see that quote from Nestlé?

5 A. I do.

6 Q. And that's from a declaration of one of Nestlé's folks,
7 one of their employees?

8 A. I believe that's correct, yes.

9 Q. All right. I'd like to look at another part of that
10 same declaration. And we're going to look at that on the
11 private screen.

12 A. Is that in the binder?

13 Q. It is, but we'll call it -- we'll call it on your
14 screen. So we'll show complete paragraphs.

15 A. Thank you.

16 MR. WOLF: Counsel, did we -- is the -- did you
17 move the Nestlé declaration in as part of moving in his
18 report?

19 MS. BALBACH: We have not.

20 MR. WOLF: Thank you.

21 Your Honor, we would move the admission of PX5017.

22 MS. BALBACH: Oh, no objection, Your Honor.

23 THE COURT: It will be received.

24 MR. WOLF: Thank you, Your Honor.

25 ///

Yeater - X

1 BY MR. WOLF: (Continuing):

2 Q. So this is the declaration you were citing in your
3 slide; is that right?

4 A. Yes. I believe that's correct.

5 Q. Okay. And let's go to paragraph 25 of this declaration
6 first, and if we can look at -- we see a reference -- I
7 don't think this is the -- it's promotional funds, the topic
8 we were just discussing; right?

9 A. Yes.

10 Q. And can you just remind the Court what we're talking
11 about when we're talking about "promotional funds"
12 generally? Not specific to this case.

13 A. The -- in general, without trying to capture any
14 specific party, the -- many of the CPG companies offer what
15 is sort of a list price or base price, and then they will
16 make -- they will offer dollars that can essentially be
17 credited against -- credited against that price, based on
18 the degree to which the customer engages in promotional
19 activity for the relevant SKU.

20 Q. And that's a big part of the claimed price of -- of
21 cost efficiencies; right?

22 If I know -- if you're getting a better promotional
23 deal than I am and, when we merge, I can get yours, that
24 saves me money; right?

25 A. As long as you don't have to change the promotional

Yeater - X

1 activity -- the form of the promotional activity that you
2 do, then -- because that would, presumably, affect other
3 aspects of your business, yes.

4 Q. Right. Fair enough. You can't say, "I'm going to do
5 both this" -- you have to pick a lane and stay in that lane
6 for any given CPG, but you can pick the best possible lane
7 for each CPG; right?

8 A. You can, yes, that fits your store and your priorities
9 and -- et cetera.

10 Q. All right. So let's look at the last clause.
11 Can we just highlight that?

12 You see that language?

13 A. I do.

14 Q. You would agree that bears directly on the -- the
15 discussion we're having in court today; right?

16 A. Well, to the extent that it -- I mean, because it
17 concerns the relationship that Nestlé, in this instance, has
18 with its customers, I think, yes.

19 Q. And whether there are specific or not specific plans
20 for each customer, that there are different lanes that can
21 be chosen; right?

22 A. Right. I think we agree, definitely, that the
23 companies have -- that companies choose lanes and choose
24 ways of promoting particular products and merchandising
25 them. I should say, since the -- I think we separate those,

Yeater - X

1 in terminology at least, and that has consequences for the
2 pricing that they receive.

3 Q. Absolutely.

4 MR. WOLF: And let's go to 34, please.

5 Thank you, Mr. Rennick.

6 It's a long paragraph, all of which is relevant and
7 presumably we'll talk about in the previously referenced
8 post-trial briefing, Your Honor, but let's focus on the
9 middle -- the sentence in the middle that begins "No."

10 Could you just read that sentence?

11 A. Out loud?

12 Q. No, no, no, no. To yourself, please.

13 A. Thank you.

14 Yes, I have read it.

15 Q. To be clear, the two quotes we've shown you were not
16 cited in your expert report; correct?

17 A. I don't think I cited them -- I don't think I quoted
18 them. That's correct.

19 Q. And you didn't reference them to those -- you reference
20 what we saw in the other side, not these; right?

21 A. Here, yes. I would -- I think, to me, what this
22 indicates is that Kroger and Albertsons engaged -- to the
23 extent that Kroger and Albertsons choose different lanes, to
24 use the term, the plans would reflect that.

25 Q. I think we agree.

Yeater - X

1 A. Okay.

2 Q. Let's move on to talk about "own transportation."

3 A. Uh-huh.

4 MR. WOLF: Slide 18. Confidential, please.

5 BY MR. WOLF: (Continuing):

6 Q. This is supply chain deficiency, I think is what you
7 characterized it as?

8 A. It's in that category in the analysis.

9 Q. And you did not attempt to calculate efficiencies
10 regarding supply chains independently; right?

11 A. Correct.

12 Q. You suggest that Albertsons could implement the
13 strategy unilaterally.

14 That's what you said in your testimony?

15 A. I -- my view is that there -- that the conclusion that
16 they cannot, because they don't plan to, is -- does not
17 allow one to conclude they're merger-specific.

18 Q. To be clear, you do not cite any evidence or testimony
19 or documents saying that Albertsons plans to do this; right?

20 A. That's correct. I don't -- I don't, no.

21 MR. WOLF: Finally, if we could go to slide -- I
22 guess it's 18. Confidentially.

23 BY MR. WOLF: (Continuing):

24 Q. And, again, I want to ask you this without being
25 specific as to numbers, you agree that the combined cost --

Yeater - X

1 I don't think this is confidential -- 250 -- \$230 billion a
2 year, roughly?

3 A. I think I calculated it as \$221 billion for '23; but,
4 you know --

5 Q. That's -- we'll use that number.

6 A. Thank you.

7 Q. Just 5 percent of that number is a very large number;
8 right?

9 A. I have to do the arithmetic.

10 Q. Let's make it simple. 1 percent of that number.
11 1 percent of that number is \$2.2 billion; right?

12 A. Correct.

13 Q. I think, for these companies, a billion dollars, like
14 for the rest of us, is a lot of money; right?

15 A. A billion dollars is a lot of money.

16 Q. You refer to a small decrease in operational costs, but
17 when your profit is only \$3 billion a year, a billion
18 dollars in savings, in the 1 percent hypothetical example,
19 that would be a lot of money.

20 A. So, again, I think the -- the -- I describe the reason
21 why I think this is relevant, which is the question of how
22 it would factor into offsetting any competitive harm. So I
23 don't know the -- whether the fact -- I don't know -- I
24 didn't calculate the effect on profits, and I don't --
25 that's not part of my analysis.

Yeater - X/ReD

1 Q. Either way, a billion dollars, in the hypothetical,
2 that would be more than many of the columns in Dr. Hill's
3 claimed harm chart; right?

4 A. That -- that may be the case. I don't -- I don't
5 recall the chart offhand.

6 Q. And there's no dispute that a billion dollars available
7 to help customers and stores and associates -- that's a
8 pretty big deal; right?

9 A. I think a billion dollars is -- it's a billion dollars,
10 but, you know, whether it's a big deal is not something I
11 feel like is language I can use here.

12 MR. WOLF: Pass the witness, Your Honor.

13 THE COURT: Any redirect?

14 MS. BALBACH: I have a little, Your Honor.

15 THE COURT: Go ahead.

16

17 REDIRECT EXAMINATION

18 BY MS. BALBACH:

19 Q. Mr. Yeater, my colleague was talking to you about
20 Mr. Crane from Smucker's testimony?

21 A. Yes.

22 Q. Is price discovery different from a cognizable
23 efficiency?

24 A. Price -- price discovery is the reasoning, as I
25 understood his testimony, that Mr. Gokhale concluded that

Yeater - ReD

1 the entirety of the net variance is merger-specific and,
2 therefore -- I think he used the word "cognizable."

3 My analysis is that price discovery is insufficient to
4 conclude that it is merger-specific under the guidelines.

5 Q. And in Mr. Crane's testimony that you heard, was
6 Mr. Crane specifically talking about price discovery?

7 A. He didn't use that phrase, no.

8 Q. My colleague also asked you some questions about
9 promotion and different lanes.

10 Do you remember that?

11 A. I do, yes.

12 Q. Do retailers have to choose a lane in promotional
13 activity?

14 A. Yes.

15 We talked some about this. I think it is important to
16 recognize that the grocery companies, just by nature of
17 having a limited amount of shelf space, and I -- I think I
18 said earlier "a limited space," that might be space in a
19 circular or the number of online promotions that they
20 display, they have limited space, and they have to make
21 choices about which products to place in which positions of
22 prominence in the store.

23 The dollars that come along with that are the dollars
24 that result in some kind of discount off of list price,
25 that's sort of the trade and promotional dollars that we've

Yeater - ReD

1 been talking about, and the question, I think, is can we
2 hold -- how -- how -- can we hold those constant so that
3 what we are isolating is a portion of the price that the
4 parties could actually negotiate with CPGs.

5 Q. So can a grocery company drive in, like, both the left
6 and right lanes at the same time?

7 A. Well, in the analogy, that would be very difficult.

8 Q. And my colleague asked you some questions about Harris
9 Teeter and Roundy's price investments.

10 A. Yes.

11 Q. You remember that?

12 A. I do.

13 Q. Is there a difference between a change in margin and
14 giving dollars back to customers?

15 A. So I think -- as I said, a change of margin can result
16 for a variety of reasons, which may not be due to what I
17 understand the parties do with price investment, which is,
18 allocate a certain amount of their budget for the purposes
19 of making targeted changes in price, and so it could -- it
20 certainly could be that gross margin has eroded; but the
21 reason why that occurs, I think, is the question that's in
22 dispute.

23 Q. Would a firm making more money -- or can a firm making
24 more money direct that -- those dollars back to
25 shareholders?

Yeater - ReD

1 A. They certainly can.

2 Q. And, I think, finally, my colleague went over the
3 administrative labor cost efficiencies.

4 Do you recall those questions?

5 A. I do.

6 Q. And there was a high estimate and a low estimate.

7 Do you recall that?

8 A. I do.

9 Q. Whose -- whose opinion contained that high and low
10 estimate of administrative labor costs?

11 A. Those estimates certainly appear in Mr. Gokhale's
12 report. My -- well, that's my -- that's where I believe
13 they occur.

14 Q. And who is Mr. Gokhale in -- in relation to this case?

15 A. Sorry. Mr. Gokhale is the plaintiffs' expert on the
16 assessment of the verifiability and merger specificity of
17 the claimed deficiencies.

18 Q. Did Mr. Gokhale rely on the BCG database in his
19 estimate of the high end of the administrative cost savings?

20 A. He found the -- he found the estimate to be verifiable
21 and merger-specific, and that is calculated via the BCG
22 database.

23 So, in that sense, yes, I think so.

24 Q. Let me correct you.

25 When we talked about Mr. Gokhale -- you may have said

Yeater - ReD

1 "plaintiffs' expert," but is -- is Mr. Gokhale defense's
2 expert?

3 A. Apologies, yes. I confused "parties'" and
4 "plaintiffs'." So, yes, he is -- he is the parties' or the
5 defense's expert.

6 Q. And one of your assignments in this case was to review
7 Mr. Gokhale's report and the backup data that he provided
8 with his expert report in this matter; right?

9 A. Correct.

10 Q. Did Mr. Gokhale provide the BCG data that he used in
11 his report to -- as an attempt to verify/validate the
12 administrative labor high-end estimates?

13 A. My -- it was not included with his expert report, and
14 the database was not included in his "materials considered,"
15 to my recollection.

16 MS. BALBACH: Nothing further, Your Honor.

17 THE COURT: You can step down.

18 THE WITNESS: Thank you, Your Honor.

19 THE COURT: We'll take our morning break. We'll
20 be in recess for 15 minutes.

21 (Recess taken.)

22 DEPUTY COURTROOM CLERK: All rise.

23 THE COURT: Please be seated. You may call your
24 next witness.

25 MR. HAMBURGER: Good morning, Your Honor.

Ashenfelter - D

1 Jacob Hamburger on behalf of Plaintiff Federal Trade
2 Commission.

3 Plaintiffs calls Professor Orley Ashenfelter.

4 THE COURT: And bring forth any binders if they're
5 going to be --

6 MR. HAMBURGER: They've already been distributed,
7 Your Honor.

8 THE COURT: All right. Thank you.

9

10 ORLEY ASHENFELTER,
11 called as a witness in behalf of the Plaintiffs, being first
12 duly sworn, is examined and testified as follows:

13

14 THE WITNESS: I do.

15 MR. HAMBURGER: May I proceed, Your Honor?

16 DEPUTY COURTROOM CLERK: State and spell your name
17 for the record.

18 THE WITNESS: The first name is Orley, O-r-l-e-y.
19 Last name is Ashenfelter, A-s-h-e-n-f-e-l-t-e-r.

20 THE COURT: Now you may proceed.

21 MR. HAMBURGER: Thank you, Your Honor.

22

23 DIRECT EXAMINATION

24 BY MR. HAMBURGER:

25 Q. Professor Ashenfelter, in the binder I just passed out

Ashenfelter - D

1 are a couple demonstratives to facilitate your testimony
2 today. That also contains your rebuttal expert reports.

3 A. Yes.

4 Q. Professor Ashenfelter, were the slides and
5 demonstrative we'll use today prepared at your direction?

6 A. Yes.

7 Q. And would you please give the Court a brief overview of
8 your educational background?

9 A. My undergraduate degree is from Claremont McKenna
10 College in California, and I have a Ph.D. from Princeton.

11 Q. Where did you work after you received your Ph.D.?

12 A. I first started teaching at Princeton University.

13 Q. When was that?

14 A. That was a long time ago. I was over there for -- I
15 just went emeritus in July. So that's one of the reasons
16 I'm here, actually. Otherwise, I wouldn't be able to escape
17 from my classroom.

18 Q. Well, congratulations.

19 And have you held any other professional positions --

20 A. Yes.

21 Q. -- relevant to this matter?

22 A. In the Department of Labor as a director of Office of
23 Evaluation. To evaluate, basically, Labor Department
24 programs.

25 Q. So you've been around for a while.

Ashenfelter - D

1 Have you received any honors or awards in the field of
2 labor economics?

3 A. Well, I've been president of the Society of Labor
4 Economists. I was also president of the American
5 Law & Economics Association. In fact, I started their
6 journal with Dick Posner, and I've also been president of
7 the American Economic Association, which is the largest
8 organization.

9 But the two things I'm fondest of are I'm elected a
10 member of the National Academy of Sciences and of the
11 American Philosophical Society.

12 Q. Can you tell me about the National Academy of Sciences?

13 A. It was started by Abraham Lincoln as an organization of
14 scientists to give advice to the various branches of the
15 Government.

16 Q. And what about the other association?

17 A. The American Philosophical Society is for -- in
18 Philadelphia, started by Benjamin Franklin, and it's
19 dedicated to the idea of developing useful knowledge. That
20 was Franklin's notion.

21 Q. Very cool.

22 So I think you also have your own consulting firm. Is
23 that right?

24 A. Yes. I started a firm called Ashenfelter & Ashmore
25 with -- with a partner, David Ashmore, who has actually

Ashenfelter - D

1 since retired.

2 Q. And have you worked on matters involving labor
3 economics throughout your career?

4 A. Yes.

5 Q. Have you worked on labor issues in antitrust cases
6 before?

7 A. Yes. Several.

8 Several litigations involving wage fixing of the wages
9 of nurses.

10 I was also listed as an expert in the animation worker
11 case where the allegation was of failure to compete,
12 basically, across firms in the animation business.

13 Medical residents most -- which is another case I was
14 involved with.

15 And then, most recently, the franchise no-poaching
16 agreements that were common amongst about half of the
17 franchise companies, which are gone now, actually, as a
18 result, mainly of the work of the Attorney General of the
19 State of Washington.

20 Q. Have you conducted any economic analyses of merger
21 cases before?

22 A. Yes. I was a government's -- one of the Government's
23 experts in the *Staples v. Office Depot* case.

24 Q. That was the first one?

25 A. Yes. Back -- way back. Back in the -- there was

Ashenfelter - D

1 someone here I saw who was actually involved in that case,
2 which is kind of surprising.

3 Q. So about how many times throughout your career have you
4 served as an economics expert?

5 A. Maybe two or three dozen.

6 Now, I don't do very many of these kinds of things in a
7 year, but I've been around a long time.

8 MR. HAMBURGER: All right. So at this time,
9 Your Honor, I would like to offer Professor Ashenfelter as
10 an expert in the field of labor economics.

11 MR. PERRY: No objection, Your Honor.

12 THE COURT: He will be designated as an expert.

13 MR. HAMBURGER: Thank you, Your Honor.

14 BY MR. HAMBURGER: (Continuing):

15 Q. Professor Ashenfelter, did you prepare an expert report
16 for this case summarizing your opinions in this matter?

17 A. Yes.

18 Q. And does your report evaluate the claims submitted by
19 Professor McCrary?

20 A. Some of them, yes.

21 Q. Have you evaluated every point in Professor McCrary's
22 reports?

23 A. No.

24 Q. Why? Why not?

25 A. The time horizon was very, very short and over the

Ashenfelter - D

1 Fourth of July weekend. So I -- I looked at two issues that
2 I thought were especially important and relevant and that I
3 could actually have time to analyze.

4 Q. All right. So for the issues that you did not address
5 in Professor McCrary's report, does that mean that you agree
6 with them?

7 A. No. I just haven't analyzed them.

8 Q. All right. And is your report that you prepared, is it
9 reflected in your binder in the tab marked PX7010?

10 It should be the very first tab there.

11 A. Yes, it's right there.

12 Q. And did you prepare this report?

13 A. Yes.

14 MR. HAMBURGER: Your Honor, I request the exhibit
15 marked PX7010 be moved into evidence.

16 MR. PERRY: No objection, Your Honor.

17 THE COURT: It will be received.

18 BY MR. HAMBURGER: (Continuing):

19 Q. So, Professor Ashenfelter, does your report contain a
20 list of information upon which you relied in forming your
21 opinions?

22 A. Yes. Yes, it does.

23 Q. All right. So let's take your first opinion.

24 Would you briefly summarize your first opinion, please?

25 MR. PERRY: Objection, Your Honor, to the slide

Ashenfelter - D

1 being shown. It shows an improper rebuttal opinion to which
2 we have an objection that we would like to be heard at an
3 appropriate time.

4 THE COURT: All right. You can be heard.

5 MR. PERRY: Thank you, Your Honor.

6 Under Rule 26(a) and many cases that I'm happy to cite,
7 a rebuttal expert is only entitled to contradict or rebut
8 evidence on the same subject matter of an initial expert.

9 Professor Ashenfelter is appearing for the first time
10 in this case. He was not disclosed as an initial expert.
11 He is responding only to Professor McCrary.

12 The second opinion, which is on the screen, refers to
13 MSAAs, that is a subject on which Professor McCrary did not
14 express any opinion in court yesterday. The word was not
15 mentioned. The subject was not addressed during direct or
16 cross-examination. This is improper rebuttal. In fact,
17 it's not rebuttal at all. There is nothing to rebut.

18 I'm happy to explain how we got to this point. It's
19 because Dr. Hill had an opinion on this subject, that he
20 later abandoned. So, first, he had an opinion.

21 Professor McCrary responded to Dr. Hill.

22 Professor Ashenfelter responded in his report to
23 Professor McCrary, but then Dr. Hill abandoned his MSAA
24 opinion. You did not hear that in this trial either.

25 Professor McCrary, therefore, had nothing to testify

Ashenfelter - D

1 about it yesterday; and, therefore, there is nothing for
2 Professor Ashenfelter to rebut on MSAAs. It is not part of
3 this case. It has not been part of the evidence, and we
4 object to any discussion of it today.

5 THE COURT: And you're talking about his second
6 opinion, not the first?

7 MR. PERRY: We have absolutely no problem with his
8 first opinion.

9 THE COURT: What I understood. I just want to
10 make sure that I'm lining up.

11 MR. PERRY: You're lining up.

12 THE COURT: We've been together for 15 days --
13 well, 14 days; but, you know --

14 MR. HAMBURGER: Your Honor, if I may be heard? I
15 just want to lay a record.

16 THE COURT: Yes.

17 MR. HAMBURGER: So Professor Ashenfelter addressed
18 MSAAs -- you've heard that throughout the testimony the last
19 three weeks -- in response to Professor McCrary's claims
20 about the effect of the merger, specifically about
21 bargaining leverage; and Professor Ashenfelter will explain
22 that he concluded that Professor McCrary's analysis of the
23 merger's effect on union bargaining leverage --

24 THE COURT: I understand what you have prepared.
25 I want you to respond to what he raised as an objection.

Ashenfelter - D

1 MR. HAMBURGER: So if I understand his objection,
2 it was that Professor McCrary did not --

3 THE COURT: No. That was not his objection.
4 Maybe you need to say it again.

5 MR. PERRY: Your Honor, a rebuttal expert may only
6 respond to the opinions expressed by an initial expert.

7 Professor McCrary did not express any opinions about
8 MSAAs, or, for that matter, bargaining leverage, in his
9 testimony yesterday. Therefore, there is nothing for
10 Professor Ashenfelter to rebut today in this rebuttal part
11 of the case.

12 MR. HAMBURGER: And if I may, Your Honor?

13 THE COURT: He's referring to what you want to
14 have him discuss in his summary of number two.

15 MR. HAMBURGER: I understand, Your Honor.

16 And Professor McCrary addressed and analyzed MSAAs in
17 his deposition. He raised that on his own in his
18 deposition, and it's -- it's in the transcript at page 254,
19 line 18. And similar to yesterday's cross-examination of
20 Professor McCrary by -- by analyzing MSAAs on his own,
21 instead in his deposition, he opened the door to this issue.

22 And in addition, defendants had an opportunity to file
23 a motion to strike his opinion prior to today's hearing.
24 They didn't file a motion to strike at all.

25 So, in my opinion, in our opinion, their objection is

Ashenfelter - D

1 untimely.

2 This is the first time they have expressed that view.

3 MR. PERRY: Your Honor, it didn't become ripe
4 until yesterday when Professor McCrary testified. And now
5 that the evidence is in, we know there's nothing to rebut,
6 and so we're raising it -- I'm sorry.

7 THE COURT: Objection sustained.

8 MR. PERRY: Thank you, Your Honor.

9 MR. HAMBURGER: To clarify, Your Honor, it's just
10 to the second point?

11 THE COURT: Correct.

12 MR. HAMBURGER: Okay.

13 THE COURT: No objection was raised to the first.

14 BY MR. HAMBURGER: (Continuing):

15 Q. So, Professor Ashenfelter, would you summarize your
16 first opinion, please.

17 A. Yes.

18 THE COURT: Take down the slide. This is not
19 accurate anymore.

20 Take down the slide.

21 THE WITNESS: Union workers -- my opinion is that
22 union workers at Kroger and Albertsons have regular
23 compensation than nonunion workers at those firms.

24 MR. HAMBURGER: Your Honor, could we put up the
25 next slide, which does not address the second opinion?

Ashenfelter - D

1 MR. PERRY: We object to the next slide because it
2 does refer to his second opinion, Your Honor.

3 MR. HAMBURGER: There's no mention of MSAAs in the
4 second opinion.

5 MR. PERRY: Your Honor, his MSAAs opinion is that
6 the MSAA gives them the means -- that's in bold on slide 3,
7 and in the next slide refers to "means," which is exactly
8 what MSAAs was designed to put in, but it's not an issue in
9 the case. So slide 4 is an improper presentation.

10 THE COURT: Do you need a moment to kind of refer
11 to what you need to edit out based on the ruling?

12 MR. PERRY: You can go to 5.

13 MR. HAMBURGER: So we can go to slide 5. My
14 colleague is permitting that.

15 THE COURT: Well, you get to examine your witness.
16 I'm just asking you: Do you need a moment to refer to what
17 you had planned to do to edit out in response to the Court's
18 ruling?

19 That's what I'm asking you.

20 MR. HAMBURGER: Yeah. I think -- I think we're
21 okay.

22 THE COURT: All right.

23 BY MR. HAMBURGER: (Continuing):

24 Q. All right. So, Professor Ashenfelter, let's walk
25 through your first opinion.

Ashenfelter - D

1 In Professor McCrary's section on market definition at
2 paragraph 125 of his report, he states that, quote:

3 "Employees at union Kroger and Albertsons stores do not
4 receive higher wages than their nonunion counterparts."

5 What are your views on this statement?

6 A. Actually, I analyzed wage rates, but unions bargain
7 over wages, hours, working conditions, and benefits. And
8 this is misleading because, although I agree with him that
9 wages are not different between the union and nonunion
10 stores, the benefits are substantially different.

11 Q. And why is that?

12 A. Well, they are different. In other words, the
13 empirical analysis shows if you -- Dr. McCrary does an
14 analysis of wage rates. He does not do any analysis, when
15 he compares union versus nonunion stores, of hours or any
16 other aspects of compensation besides the wage rate itself.

17 Q. All right. And in your first opinion, what is your
18 conclusion?

19 A. Union workers have higher total pay, primarily because
20 they work more hours, and union workers receive greater
21 benefits.

22 Q. All right.

23 A. Which we call it -- to put it bluntly, there's a
24 wage -- it isn't -- in labor economics, this hasn't been
25 explained. It'll be a good use if I do.

Ashenfelter - D

1 Where there's a wage rate, earnings is wages times
2 hours, and compensation is the full cost of an employee it
3 benefits.

4 Q. All right. So how did you analyze the effect of
5 unionization on total pay?

6 A. I used exactly the same method McCrary did. I took his
7 regression analysis with the same variables, and I simply
8 substituted as the dependent variable, instead of the hourly
9 wage, total pay at Albertsons. "Total earnings," we should
10 say. Total -- I hate that word: "Pay." We should say,
11 "Total earnings at Albertsons."

12 Q. All right. And so, just again, how is what you did
13 different from what Professor McCrary presented in his
14 report?

15 A. He did not analyze total earnings. He just analyzed
16 the hourly wage, and this does exactly what he did, except
17 that it includes, as the thing to be explained, total
18 earnings.

19 Q. All right. And what is your conclusion?

20 A. Total pay is 13 percent higher at Albertsons for union
21 workers than nonunion workers.

22 Q. All right. And how much more money are we talking
23 about in real terms?

24 A. About \$3,300 a year for the typical worker. The
25 typical worker is defined in the footnote of the table.

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1 Q. All right. And in the demonstrative in front of you,
2 the words "statistically significant" appears.

3 A. Yes. It's common.

4 Q. What does that mean?

5 A. It's common in econometric analyses. Econometrics is
6 just the application of economics -- of statistics to
7 economics. It's common to test whether or not a difference
8 that you find in an empirical analysis is unlikely to be due
9 to chance, and we use a measure called "statistical
10 significance." It means that this result is unlikely to be
11 negligible at less than a 5 percent probability in a
12 particular case.

13 But it's kind of like people talk about margin of
14 error. It's the same idea.

15 Q. All right. And I see that you focus on Albertsons.

16 Why did you focus on Albertsons here?

17 A. In the time period I had, the data for Albertsons
18 was -- almost -- it was ideal for actually being able to do
19 this analysis very quickly without having to make any giant
20 additional computations.

21 The data I had for Kroger's didn't permit that.

22 Q. All right. Professor Ashenfelter, so you also looked
23 at hours worked. How do you analyze the effect of
24 unionization on hours worked?

25 A. In exactly the same way as I analyze total earnings.

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1 Using McCrary's regression framework and his
2 variables -- the things he thought should be controlled for,
3 I simply substituted hours worked over the course of the
4 year for the wage rate and computed the regression analysis
5 to get the effect that's displayed in the table.

6 Q. So how is this different from what Professor McCrary
7 did?

8 A. That's only different because I use -- I explain here
9 hours worked rather than the hourly wage rate.

10 Q. All right. And are hours guarantees something that the
11 union bargains for that -- that workers might value?

12 A. Well, as I said, it is a basic principle that unions
13 bargain for wages, hours, benefits, and working conditions.

14 Yes, of course, hours are important.

15 Q. And can you explain why hours guarantees are something
16 that workers might desire?

17 A. Yes. The basic idea in -- in labor economics, we think
18 of people as facing a wage rate and then choosing the hours
19 they'd like to work. However, sometimes employers do not
20 offer what it is that the employee would like to work at for
21 the wage rate they're being offered.

22 You could be asked to work more. Typically, there's an
23 extra pay if you have to be asked to work more, and
24 sometimes employers don't provide enough offers -- hours to
25 satisfy what a worker would like.

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1 So hours guarantees can be quite important.

2 And, of course, if they're negotiated by the union,
3 presumably, it's something that's of considerable interest
4 to the workers.

5 Q. All right. And what was your conclusion? What did you
6 find in your analysis here?

7 A. Union workers were working about 15 percent more hours
8 than nonunion workers at Albertsons.

9 Q. Okay. So for the average worker, about how many more
10 hours per year does this equate to?

11 A. Well, for the typical worker, it's about 232 hours.
12 It's in the document here for -- maybe 4.5 -- I would like
13 to think of it as probably as 4.5 hours per week.

14 Q. All right. And did you look at overtime hours as well?

15 A. Yes.

16 Q. What were your results?

17 A. Union workers work more overtime hours than nonunion
18 workers also.

19 Q. Okay. Does overtime hours impact worker pay?

20 A. Sure. You get -- obviously get paid for the hours;
21 but, typically, there's a premium for -- depending on the
22 collective bargaining agreement, for overtime hours.

23 Q. So there's been testimony throughout this hearing that
24 compensation never goes down in what I'll call absolute
25 terms. Does that change your opinion?

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1 A. No. No. The -- the issue of whether or not
2 compensation -- compensation is always increasing over time,
3 and the real issue is what happens to compensation increases
4 compared to what otherwise would have occurred.

5 MR. HAMBURGER: And, Mr. Duncan, if we can move to
6 the next slide.

7 BY MR. HAMBURGER: (Continuing):

8 Q. So we've heard that if workers earn 13 percent more pay
9 but work 15 percent more hours, that they are working more
10 for less pay. Why aren't the effects the same here?

11 A. Well, the reason is because these are two separate
12 regression analyses, and each one had provided zone
13 estimates. But the differences -- the difference between
14 them is not significantly different.

15 The two numbers are not significantly different.

16 Q. All right. So let's move on to the next part of your
17 first opinion, Professor Ashenfelter.

18 What did you do to analyze the effect of unionization
19 on total benefits?

20 A. Here, I'm actually able to do an analysis of Kroger as
21 well. And, again, the analysis is done exactly the same way
22 as before, precisely as McCrary did his analysis, simply
23 substituting a different dependent variable in the analysis.

24 In other words, I'm explaining something different from
25 just the hourly wage rate, which is that -- there are

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1 several of these listed here.

2 For Albertsons, there's a measure of total benefits
3 plus payroll taxes. That's, as you can see, about 29
4 percent higher for union workers than nonunion workers, and
5 that's statistically significant also.

6 Q. Okay. Did Professor McCrary analyze the effect of
7 unionization on benefits specifically?

8 A. Professor McCrary -- I want to be very clear about
9 this. I was here yesterday for his testimony, and there was
10 an analysis at the end of his testimony about differences in
11 benefits, but not between union and nonunion workers. His
12 analysis was about differences between union workers.

13 He did not provide any analysis, so far as I'm aware,
14 about differences in benefits between union and nonunion
15 workers at Kroger or Albertsons.

16 Q. Is what Professor McCrary presented yesterday in front
17 of the Court in apposition with your results?

18 A. No. It had nothing to do with what I'm doing.

19 Q. Why is that?

20 A. Because he didn't analyze the difference between union
21 and nonunion workers.

22 Q. All right. So at bottom, what is your conclusion in
23 your first opinion?

24 A. Well, as you can see from the table, benefits at
25 Kroger's are higher for union than for nonunion workers.

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1 This is -- in effect, it's just common sense. Why would
2 there be a union of hundreds of thousands of workers if they
3 didn't get any benefit from it?

4 Q. So does it -- does it make economic sense, in your
5 view, for union members to pay dues just to get what
6 nonunion workers also get?

7 A. No. That doesn't make much sense.

8 Q. Okay. Can you -- can you explain why?

9 A. Well, who would pay anything for nothing?

10 It's not just union workers. Most of us expect to get
11 something when we make a payment.

12 MR. HAMBURGER: All right. And, Mr. Duncan, if we
13 can move on to slide 12, please.

14 BY MR. HAMBURGER: (Continuing):

15 Q. All right. So could you just explain again for us what
16 your conclusion was in your first opinion?

17 A. Total compensation for unionized workers is greater at
18 Albertsons and Kroger than it is for nonunion workers.

19 What that means is that, contrary to what Dr. McCrary
20 said in his report, it would be possible to reduce the total
21 compensation of unionized workers without actually reducing
22 that level of compensation to the level of nonunion workers,
23 and therefore it would be possible to reduce the
24 compensation without losing those workers to other
25 employers.

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1 MR. HAMBURGER: All right. So, Mr. Duncan, if we
2 could just take down the presentation, please.

3 BY MR. HAMBURGER: (Continuing):

4 Q. All right. So, Professor Ashenfelter, I would like to
5 ask you about your second opinion.

6 So Professor McCrary --

7 MR. PERRY: Objection, Your Honor. The second
8 opinion is out of the case.

9 MR. HAMBURGER: I can rephrase the question.

10 THE COURT: Do. Because it's sustained. The
11 objection is sustained.

12 BY MR. HAMBURGER: (Continuing):

13 Q. So in Professor McCrary's section on competitive
14 effects in paragraph 191, he stated that --

15 MR. PERRY: Objection, Your Honor. It's the same
16 subject.

17 MR. HAMBURGER: I didn't say anything about MSAAs.

18 MR. PERRY: I have got 191 in front of me,
19 Your Honor. I know exactly what it says, and so does
20 Mr. Hamburger.

21 MR. HAMBURGER: It doesn't say anything about
22 MSAAs, and I'm not going to ask about MSAAs.

23 THE COURT: Ask your question very carefully.

24 BY MR. HAMBURGER: (Continuing):

25 Q. So, Professor Ashenfelter, again, in paragraph 191 of

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1 Professor McCrary's section on competitive effects, he
2 states that bargaining with a larger firm merely raises the
3 stakes of the negotiation for both the firm and the union.
4 Neither side is necessarily disadvantaged. So --

5 MR. PERRY: Objection, Your Honor.

6 Professor McCrary did not offer that opinion in court
7 yesterday. That was responsive to a Dr. Hill opinion that
8 Dr. Hill withdrew, and therefore it's not in the case.

9 THE COURT: But is his report in the case?

10 MR. PERRY: His report is in evidence, Your Honor.

11 THE COURT: So he will be able to answer that
12 question. Overruled.

13 MR. PERRY: Thank you, Your Honor.

14 BY MR. HAMBURGER: (Continuing):

15 Q. Professor Ashenfelter, would you like me to ask the
16 question again?

17 A. Yeah. Sure.

18 Q. Okay. All right. So in paragraph 191,
19 Professor McCrary's opinion or report on competitive
20 effects, he says: Bargaining with a larger firm merely
21 raises the stakes of the negotiation for both the firm and
22 the union. Neither side is necessarily disadvantaged.

23 Do you agree with Professor McCrary's statement?

24 A. No.

25 Q. Can you explain, without addressing MSAAs, why you

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1 believe that?

2 MR. PERRY: Objection, Your Honor. There are no
3 opinions disclosed in Professor Ashenfelter's report that
4 responds to that opinion from Mr. -- to Professor McCrary
5 that do not include MSAAs.

6 So this is calling for an undisclosed opinion for the
7 first time on the stand.

8 MR. HAMBURGER: So Professor Ashenfelter does
9 discuss more than just MSAAs in his report. It's not just
10 limited to MSAAs. He explains why the Professor's analysis
11 of bargaining leverage in his report is incomplete and --

12 THE COURT: So ask that question.

13 MR. PERRY: Your Honor? Well --

14 THE COURT: So I'm sustaining the objection.

15 Undisclosed reports and testimony can't be used.

16 MR. HAMBURGER: Yeah. This is not -- this is not
17 an undisclosed opinion, Your Honor. This is -- this is just
18 an analysis of bargaining leverage. It's contained within
19 his report.

20 THE COURT: All right.

21 BY MR. HAMBURGER: (Continuing):

22 Q. So, Professor Ashenfelter, can you explain why you
23 believe that Professor McCrary's analysis of union
24 bargaining leverage is incomplete?

25 A. Well, it's -- there isn't much to it -- his analysis.

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1 But it leaves it at that same point, simply stating that you
2 have larger -- larger -- a larger group, since the merger
3 would mean that they would bargain together, and it doesn't
4 take account of the fact that there are some tactics that
5 clearly imply that the -- the firms would prefer the larger
6 group.

7 MR. PERRY: Objection, Your Honor. The witness --
8 the witness has just testified, quote, "There are tactics
9 that employers can employ."

10 In paragraph 36 of Professor Ashenfelter's report, he
11 only identifies one such tactic, which is an MSAA. There
12 are no other tactics disclosed in his report.

13 I am happy to read the sentence, by the way, Your
14 Honor, which is -- the point Professor Ashenfelter just
15 made: Dr. McCrary's analysis of bargaining leverage is
16 incomplete because it ignores an important tool used by
17 these firms to increase this leverage relative to unions.
18 Colon. MSAA's. Period. Full stop.

19 That is Professor Ashenfelter's disclosed opinion, but
20 he just offered that opinion today without trying to use the
21 word "MSAA's" in contrary -- contravention of the Court's
22 ruling, we submit.

23 MR. HAMBURGER: Your Honor, I would ask counsel to
24 direct me to the paragraph he's quoting from.

25 MR. PERRY: Paragraph 36 of Professor

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1 Ashenfelter's report. Page 14.

2 THE COURT: I'll give you a moment to review it.

3 MR. HAMBURGER: Your Honor, if I may? At the top
4 of paragraph 36, this is PX7010-016. Professor Ashenfelter
5 writes that Dr. McCrary ignores important evidence related
6 to bargaining leverage.

7 And as we heard throughout the hearing and yesterday,
8 Dr. McCrary -- Professor McCrary argues that the result of
9 Kroger's acquisition of Albertsons will simply be a larger
10 firm for the union to bargain with.

11 THE COURT: I remember the testimony.

12 MR. HAMBURGER: So Professor Ashenfelter's
13 analysis is that Professor McCrary's analysis is incomplete,
14 and his analysis of bargaining dynamics and bargaining
15 leverage is incomplete; and so that's his -- that's, at
16 bottom, what his conclusion is.

17 And so if we may, Your Honor, we can discuss why that
18 is without a discussion of mutual strike assistance
19 agreements and Professor Ashenfelter --

20 THE COURT: I'm sustaining the objection.

21 MR. HAMBURGER: Your Honor, may we have a
22 five-minute recess to confer with counsel?

23 THE COURT: Yes. Court is in recess for five
24 minutes.

25 (Recess taken.)

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1 DEPUTY COURTROOM CLERK: All rise.

2 THE COURT: Please be seated. You may continue.

3 MR. HAMBURGER: Thank you.

4 Your Honor, I would like to direct you to a portion of
5 yesterday's transcript in which Professor McCrary testified
6 on bargaining leverage, and if I may read it out so I can --
7 I can.

8 THE COURT: No. What is your argument? What is
9 your argument?

10 MR. HAMBURGER: My argument is that
11 Professor McCrary discussed bargaining leverage yesterday
12 and the change in bargaining leverage that will or will not
13 occur as a result of the merger.

14 THE COURT: He did. That's true.

15 MR. HAMBURGER: And so I -- I -- there are --
16 there is a portion in Professor Ashenfelter's report that
17 does not discuss MSAAs, and so what I would like to do is
18 ask Professor Ashenfelter to respond to what
19 Professor McCrary did testify to yesterday, which was --
20 which Professor Ashenfelter was responding to in his report.

21 THE COURT: Say the last part again. I'm just
22 trying to braid it all together.

23 MR. HAMBURGER: I know there are a lot of moving
24 parts. So yesterday Professor --

25 THE COURT: I understood that. Just the last

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1 part.

2 MR. HAMBURGER: So Professor Ashenfelter, in his
3 report at paragraph 43, addressed the change in bargaining
4 leverage, and so that is not related to MSAAAs, which I
5 understand Your Honor -- we -- has been struck.

6 And so if I may, Your Honor --

7 THE COURT: I struck the discussion of MSAAAs.

8 MR. HAMBURGER: Right.

9 THE COURT: The expert talked about a lot of other
10 things yesterday.

11 MR. HAMBURGER: Yes. So my argument is that
12 Professor Ashenfelter be allowed to respond to
13 Professor McCrary's discussion of bargaining leverage, which
14 he discussed yesterday, and which Professor Ashenfelter
15 responds to in paragraph 43 of his report.

16 There's no discussion of MSAAAs in that paragraph.

17 And so I, respectfully, Your Honor, request that he be
18 able to respond to yesterday's discussion of bargaining
19 leverage with his opinion in paragraph 43.

20 MR. PERRY: Your Honor? I'm sorry.

21 THE COURT: I'll hear from you. I know you have
22 been waiting to address the Court.

23 MR. PERRY: Thank you, Your Honor.

24 Paragraph 43, as is customary, follows paragraph 42.
25 Paragraph 42 says, quote, "This view of the role of

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1 MSAAAs" -- and it goes on to discuss MSAAAs for very long
2 time, and then paragraph 43 begins, "Conversely, when the
3 unions in this industry" -- and then it goes on.

4 So it is -- it is -- actually, they have to be read
5 together. 42, and 43 is the converse. MSAAAs and non-MSAAAs.
6 So it is not divorced from MSAAAs, Your Honor. It's part of
7 a discussion.

8 I'm sure the Court has looked at the opinion. I mean,
9 we have a long section here, section 4 of the opinion, the
10 headings are: A Background on MSAAAs. Kroger's and
11 Albertsons' Historical Use of MSAAAs. The Significance of
12 MSAAAs. Understanding Post-Merger Bargaining. Conclusion.
13 The whole thing -- there's nothing that's not about MSAAAs in
14 this report, Your Honor. It's his only opinion.

15 MR. HAMBURGER: Your Honor, this discussion
16 specifically addresses how employers and unions interact
17 during -- during bargaining, and this is a direct discussion
18 to bargaining leverage that occurs during the union
19 collective bargaining process to which Professor McCrary
20 yesterday discussed at page 3107, line 43, and he had
21 specifically addressed why the bargaining leverage will not
22 change, to which Professor McCrary -- Professor
23 Ashenfelter -- I'm sorry -- addressed in his report, at
24 page 43. There's no mention of MSAAAs.

25 Mr. Perry did not read off the full paragraph; but,

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1 respectfully, Your Honor, I would request that the Court
2 review paragraph 43.

3 THE COURT: Oh, I have it up. I am overruling the
4 objection, but I want to be really clear. I know this has
5 been a lot of information. I understand. There was the
6 testimony, as Mr. Perry indicated. There was a lot of
7 discussion about other competitive advantages, and he can
8 respond to that in a limited fashion.

9 I also understand that you have prepared a certain
10 examination, but you're going to have to pivot and pivot
11 now.

12 MR. HAMBURGER: Yes, Your Honor.

13 BY MR. HAMBURGER: (Continuing):

14 Q. So, Professor Ashenfelter, can you discuss for us your
15 opinion of bargaining leverage in light of
16 Professor McCrary's opinion on bargaining leverage that he
17 testified to yesterday?

18 MR. PERRY: Objection, Your Honor. Limited to
19 paragraph 43, I take it, is the --

20 THE COURT: Yes.

21 BY MR. HAMBURGER: (Continuing):

22 Q. And, Professor Ashenfelter, I would suggest that you
23 review paragraph 43 of your report and -- and respond to
24 Professor McCrary's testimony yesterday.

25 A. Sure. Paragraph 43 explains how the way the union

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1 decides whether to strike one or more of these firms at the
2 same time -- whether that's an attractive option for them,
3 as opposed to striking one as opposed to the other, and then
4 using implicit -- obviously, implicit in that is they would
5 then use any bargaining advantage they got from the one
6 employer to try leverage up pay for the other employer.

7 And what this explains, basically, is just that the
8 preferences revealed by the unions are to strike one, rather
9 than both at the same time, implying that, if that were not
10 an option, they would be at a disadvantage.

11 Q. All right. And what does that behavior tell you about
12 the unions' bargaining leverage and that revealed preference
13 post-merger?

14 A. I think it reveals just what I said, which is that the
15 union prefers to strike just one of the two employers, not
16 both, and that the result of the merger would mean that's
17 not possible for them to do.

18 So they would lose some advantage in bargaining.

19 Q. All right. And why would they lose that advantage?
20 Sorry. Let me clarify my pronouns.

21 Why would the unions lose that option?

22 A. Because there's only one company after the merger.

23 Q. And if there's only one company after the merger to
24 bargain with, what effect would that have on the union's
25 bargaining leverage?

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1 A. Well, the union -- as I explain, the union seems to
2 prefer that there be two, which implies that the single firm
3 would be a disadvantage for them.

4 Q. All right. So, Professor Ashenfelter, just to wrap up,
5 you've offered two different opinions today. Could you
6 explain those two different opinions to the Court, please.

7 A. Well, I first showed that total compensation in
8 union -- for union Kroger's and Albertsons' employees is
9 higher than for nonunion employees. So that meant that
10 there could be some diminution in their compensation, the
11 compensation of union employees, without making them --
12 making their compensation as low as nonunion employees', and
13 that the -- the revealed preference of the union is that
14 they would potentially lose the bargaining leverage that
15 allows them to keep the differential that they currently
16 have.

17 Q. And what is your takeaway from that conclusion?

18 A. Well, my takeaway is that the merger would potentially
19 offer the opportunity and the means for union compensation
20 to be reduced.

21 MR. HAMBURGER: No further questions.

22 THE COURT: Any cross-examination?

23 MR. PERRY: Just a bit, Your Honor.

24 THE COURT: All right. I know we're going into
25 the lunch hour, but in light of we have one more witness, we

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1 will finish this witness and take our lunch break.

2

3

CROSS-EXAMINATION

4 BY MR. PERRY:

5 Q. Good afternoon, Professor Ashenfelter, as it has ticked
6 over here.

7 A. Oh, is it afternoon?

8 THE COURT: It is now.

9 BY MR. PERRY: (Continuing):

10 Q. Lovely to see you again.

11 Where we left off with my colleague is that -- your
12 opinion that the unions would lose some advantage by having
13 to bargain with one employer rather than two.

14 Do I have that right?

15 A. Yes.

16 Q. You're a well-credentialed, in fact expert,
17 econometrician; right?

18 A. Yes.

19 Q. Econometrics is the applicability of data or statistics
20 to economics; right?

21 A. It's the application of statistics to economics, yes.

22 Q. And that's the work you do in the academy and as an
23 expert witness?

24 A. I do it often. Not always, but often.

25 Q. You did not apply any econometric analysis to the

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1 opinion that unions would have less leverage following the
2 merger; correct?

3 A. That's correct.

4 Q. You have not attempted to quantify the change in
5 leverage, if any, that the merger will give to unions;
6 correct?

7 A. Correct.

8 Q. There is no way to know if it's zero or a hundred, and
9 we don't even have a measure for it; right?

10 A. I don't know how to measure it. That's correct.

11 Q. So if it exists, we don't know whether it's a big deal
12 or not a big deal; right?

13 A. I don't know if I'd go that far. I'm just saying I
14 don't know.

15 Q. You don't know. I'll take that. You don't know, and
16 we'll leave it at that.

17 All right. You know -- I'm switching gears now,
18 Professor Ashenfelter.

19 You were retained to respond to Professor McCrary's
20 opinions; right?

21 A. Yes.

22 Q. And you remember that was because Dr. Hill first
23 advanced a bunch of labor opinions and then he abandoned
24 them; right?

25 A. I didn't know about the abandoning. Now, I read the

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1 original report.

2 Q. But you read the reply report too; right?

3 A. I can't remember if I did or not. I may not have.

4 Q. If you testified in your deposition that you did, would
5 it --

6 A. Well, then I probably did.

7 Q. Dr. Hill's reply report is in evidence in this case.
8 It's PX7006, and it says -- does this sound familiar,
9 Professor Ashenfelter? It says, quote, "It is my
10 understanding that Dr. Orley Ashenfelter will respond to
11 Dr. McCrary's assertions," end quote.

12 Is that your understanding?

13 A. Yeah. I guess that's right.

14 Q. So Professor -- Dr. Hill is not responding to
15 Professor McCrary, you are?

16 A. Well, that's what he says. I mean, I don't actually
17 know what Mr. Hill is doing, but --

18 Q. That's fair.

19 Now, Mr. Hamburger started out the examination today by
20 noting that your first opinion relates to the market
21 definition section of Professor McCrary's opinions; correct?

22 A. Yes.

23 Q. But you are not actually offering any opinions on
24 market definition; right, Professor Ashenfelter?

25 A. Yes.

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1 Q. And just so we're clear on this --

2 MR. PERRY: Mr. Rennick, if we can put up DDX27-4?

3 BY MR. PERRY: (Continuing):

4 Q. This is Professor McCrary's summary of his principal
5 opinions in this case, Professor Ashenfelter. You are
6 not --

7 A. I saw that, actually, when he -- I was here when he
8 testified.

9 Q. You were here, yes, I appreciate that, as I was and as
10 the Court was.

11 You are not disputing Professor McCrary's opinion that,
12 quote, "The labor market is broader than union grocery."
13 Right?

14 A. I haven't analyzed that opinion at all.

15 Q. And you are not disputing Professor McCrary's opinion
16 that, quote, "CBA areas is not irrelevant geographic
17 market." Right?

18 A. I'm not disputing it; but as you may recall, when I
19 opened my testimony, I also didn't say I agreed with it.

20 Q. That's fine. You're not offering an opinion about it
21 in this court.

22 A. Correct.

23 Q. All right. And you're not offering any opinion that
24 union grocery labor is a relevant product market; right?

25 A. No.

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1 Q. And you --

2 A. I --

3 Q. Correct?

4 A. I am not.

5 Q. You are not. Thank you.

6 And you are not offering any opinion on the use of
7 local CBA areas as a relevant geographic market; right?

8 A. That's right.

9 Q. Okay. If we put those two together, you are not
10 disputing Professor McCrary's first opinion that, quote,
11 "Union grocery labor in CBA areas is not a valid antitrust
12 market." Right?

13 MR. HAMBURGER: Objection, Your Honor. Outside
14 the scope of my direct. I didn't address CBA areas or any
15 geographic market at all in my direct.

16 MR. PERRY: Your Honor, two responses: First, he
17 did point out that the analysis that Professor Ashenfelter
18 does goes to market definition. Professor Ashenfelter chose
19 to address a part of it.

20 Second, the witness disclosure that the FTC served in
21 this case -- the Court received it on Friday of the pretrial
22 conference -- says --

23 Mr. Rennick, why don't we put that up.

24 -- what the subjects of his testimony are going to be.

25 Do we have that witness disclosure?

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1 Orley Ashenfelter, Ph.D. Summary of general topics:
2 Market definition.

3 This was the FTC's disclosure of why he's being brought
4 to this court, Your Honor.

5 MR. HAMBURGER: Your Honor, if I may?

6 We didn't address CBA area or geographic market as part
7 of our direct. It was outside the scope of the testimony
8 today.

9 THE COURT: Sustained.

10 MR. PERRY: Thank you, Your Honor.

11 BY MR. PERRY: (Continuing):

12 Q. On Professor McCrary opinions, Professor Ashenfelter,
13 you are not disputing Professor McCrary's second opinion
14 that, quote, "Market concentration is very low in any
15 properly defined labor market." Correct?

16 A. I'm not disputing that, but I'm not agreeing with it.
17 I just want to make very clear --

18 MR. HAMBURGER: Objection, Your Honor. In my
19 direct of Professor Ashenfelter we also did not discuss
20 concentration.

21 THE COURT: Sustained. It was limited. He had a
22 limited --

23 MR. PERRY: Understood, Your Honor.

24 And one of the points is how limited it is.

25 THE COURT: I'm sorry?

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1 MR. PERRY: One of the points is how limited it
2 is.

3 THE COURT: Oh, okay.

4 BY MR. PERRY: (Continuing):

5 Q. Professor Ashenfelter, you not did not address
6 Professor McCrary's third opinion that, quote, "The merger
7 is not likely to lead to harm for workers." Correct?

8 A. Well, I think I did address that.

9 Q. In your first opinion?

10 A. Yes.

11 Q. Okay. So let's talk about your first opinion.

12 You're -- you just testified -- your testimony is that
13 your first opinion goes to harm to workers from the merger;
14 correct?

15 A. Well, what I said was I don't know whether -- I didn't
16 use those words, but what I did say was that it was possible
17 for union compensation to be reduced relative to nonunion
18 compensation without -- without going all the way to
19 nonunion compensation.

20 It was a response to Dr. McCrary, who stated explicitly
21 that there would be no harm to union workers because they
22 were receiving the same wage rates as nonunion workers.

23 My response was, "Yes, but their benefits aren't the
24 same."

25 Q. That's a great summary. Thank you for setting it up

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1 for us, Professor Ashenfelter.

2 So let's start with hourly wages.

3 You don't disagree with Professor McCrary that there's
4 no difference in hourly wages -- correct? -- for union and
5 nonunion workers?

6 A. On average, there's no difference. That's correct.

7 Q. And that was all of Professor McCrary's opinion; right?

8 A. That was his opinion, yes.

9 Q. So on the opinion that Professor McCrary actually
10 offered in the court yesterday, you don't disagree?

11 A. I don't disagree with that, no.

12 Q. Okay. And you mentioned on your direct examination
13 that you performed exactly the same regressions as
14 Professor McCrary.

15 Did I get that right?

16 A. Yes. Except for changing the dependent variable.

17 Q. The dependent variable.

18 So you don't disagree with Professor McCrary's
19 regression methodology or framework; right?

20 A. I probably wouldn't put it quite like that.

21 Q. Fair enough.

22 A. In other words, I used his methods so as to avoid
23 controversy. It seemed like a perfectly reasonable way to
24 start.

25 Q. It might not be the way you would have done it, but you

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1 did it here as well; right?

2 A. Yes.

3 Q. Okay. But he did something that you didn't do --
4 right? -- which is the overlap analysis?

5 A. I did not do that. You're correct.

6 Q. So just so we remember, an overlap analysis is
7 Professor McCrary ran the regressions first in a local area
8 where there's both a Kroger and an Albertsons store and then
9 in a local area where there's only either a Kroger or an
10 Albertsons store. Right?

11 MR. HAMBURGER: Objection, Your Honor. I also did
12 not address this in my direct.

13 The overlap analysis that Professor McCrary did was not
14 part of my -- of my direct of Professor Ashenfelter.

15 MR. PERRY: Your Honor, he testified that it was
16 exactly the same regression. I'm establishing it's not
17 exactly the same regression. And Professor Ashenfelter
18 expressly addressed the overlap analysis about two-thirds of
19 the way through point one, when he addressed the opinions
20 offered yesterday for Mr. McCrary on the stand regarding the
21 non-wage benefits, that that is an overlap analysis; and
22 Professor Ashenfelter testified this morning that
23 Professor McCrary, in fact, did something different, and I'm
24 exploring the meaning of -- the importance of that
25 difference with this rebuttal witness.

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1 THE COURT: Overruled.

2 BY MR. PERRY: (Continuing):

3 Q. We have an overlap analysis in Professor McCrary's
4 report; right?

5 A. Yes.

6 Q. And you do not have an overlap analysis --

7 A. That's correct.

8 Q. -- of any sort?

9 All right.

10 A. I did not analyze his analysis of that issue.

11 Q. And do you recall that Professor McCrary's overlap
12 regression is put forward in Exhibit 22 to his report?

13 DDX27-45? I'm sorry.

14 Do you recall this slide? It was in
15 Professor McCrary's demonstratives yesterday, and you
16 address it in your rebuttal report; right,
17 Professor Ashenfelter?

18 A. No, I don't address this.

19 Q. You don't address this?

20 A. That's correct.

21 Q. You don't disagree with it?

22 A. I did see -- I didn't analyze this set of issues.

23 MR. HAMBURGER: Objection, Your Honor. Again,
24 Professor Ashenfelter just said he did not analyze this
25 issue.

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1 THE COURT: Sustained.

2 THE WITNESS: Just to be clear --

3 THE COURT: No, no. I sustained it, so you don't
4 answer.

5 There will be another question.

6 BY MR. PERRY: (Continuing):

7 Q. Your testimony today that union workers receive more
8 total compensation or earnings, as you put it, is not
9 dependent on wages -- hourly wages.

10 MR. HAMBURGER: Your Honor, if I may?

11 THE COURT: Then you let him finish asking his
12 question so that I can understand what's going on.

13 MR. HAMBURGER: Yes, Your Honor. Yes, Your Honor.

14 THE COURT: Sit down.

15 I'll let him respond to what he asks before you answer,
16 Dr. Ashenfelter.

17 Go ahead.

18 MR. PERRY: Let me reset for a second,
19 Professor Ashenfelter.

20 BY MR. PERRY: (Continuing):

21 Q. You recall that Professor McCrary testified that there
22 is no statistically significant difference in hourly wages
23 between union and nonunion employees; correct?

24 A. Yes.

25 Q. And you don't disagree with that point; right?

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1 A. Correct.

2 Q. And your opinion is that there is a difference in other
3 aspects of compensation and benefits for union employees as
4 opposed to nonunion employees; correct?

5 A. Yes.

6 Q. That includes the hours worked?

7 A. Yes.

8 Q. And that also includes non-wage benefits; correct?

9 A. Yes.

10 Q. And that's what you have called a union premium?

11 A. I'm sorry. That's what?

12 Q. You called that a union premium?

13 A. It's a part of a -- yes. A union premium. Some people
14 call it that.

15 Q. And to calculate that union premium, you compared all
16 unionized stores nationwide to all non-unionized stores
17 nationwide; correct?

18 A. Yes.

19 Q. But you did not analyze, Professor Ashenfelter, whether
20 any of that so-called union premium is the result of
21 competition between Kroger and Albertsons; correct?

22 A. I didn't determine what the basis for the -- for the
23 difference was, no. I didn't -- I didn't estimate
24 differentials other than that overall average differential.

25 Q. And, specifically, you did not determine whether it is

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1 the result of competition between Kroger and Albertsons;
2 correct?

3 A. I didn't analyze that. That's right.

4 Q. You could have analyzed that.

5 Do you agree with me?

6 A. Not in the time that I had, no.

7 Q. Well, let's set time aside.

8 Did you have the data to make that analysis?

9 A. I don't know.

10 Q. Did Professor McCrary have the data to make that
11 analysis?

12 A. He did an analysis, which, as I said, I don't have --
13 I've not tried to analyze or draw any opinions about.
14 Whether or not it was a good analysis or not, I don't -- I
15 have not struck any opinion about that. I don't have any
16 opinion about it.

17 Q. All right. Let me just be clear.

18 A. I'm not sure if I would do it the same way or if what
19 he did was a good way or not.

20 Q. Let me ask it this way: You did not compare Albertsons
21 unionized stores in a locality where there was a Kroger
22 store as distinguished from Albertsons stores in a locality
23 where there is not a Kroger store; correct?

24 A. Yes. I did not.

25 Q. And, conversely, you did not compare a Kroger unionized

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1 store in a locality where there's an Albertsons store as
2 distinguished from Kroger stores in a locality where there's
3 not an Albertsons store; right?

4 MR. HAMBURGER: Objection, Your Honor. This is,
5 again, going into Professor McCrary's Exhibit Number 22,
6 which has previously been an objection that I raised and
7 sustained.

8 This is the -- this is the line of questioning that I
9 raised earlier.

10 MR. PERRY: Your Honor, this line of questioning
11 will establish that Professor Ashenfelter did not analyze
12 the competitive dynamics between Kroger and Albertsons.
13 This is an antitrust case in which the United States
14 Department -- or Federal Trade Commission is saying that the
15 merger will lessen competition in the market -- in a
16 supposed market for grocery union labor, and I'm going to
17 ask -- would like to ask this witness whether he analyzed
18 that question.

19 THE COURT: I'm going to sustain the objection,
20 but you can ask that question.

21 BY MR. PERRY: (Continuing):

22 Q. Let me jump straight to that question.

23 Professor Ashenfelter, is it true that you are not
24 offering any opinion in this case that the proposed
25 transaction between Kroger and Albertsons is likely to

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1 substantially lessen competition in any relevant labor
2 market?

3 A. Yes.

4 Q. Thank you, Professor Ashenfelter.

5 Now, you did have the data, isn't it true, to perform
6 the overlap comparison that would have allowed you to answer
7 that question?

8 A. No, I did not have the appropriate data to do the
9 analysis that I would have wanted to do, no.

10 MR. PERRY: Your Honor, I would like to take the
11 Court's attention to his deposition, which is in the binder.
12 PX4158 at page 127, lines 12 to 14.

13 THE COURT: Give me the page number again.

14 MR. PERRY: Yes, Your Honor. 127, lines 12 to 14.

15 The setup for the question is a little above.

16 May I ask the witness what he said in his deposition,
17 Your Honor?

18 THE COURT: I'm making sure you have -- you've
19 seen it?

20 MR. HAMBURGER: I see it.

21 THE COURT: All right. Go ahead.

22 MR. PERRY: Thank you.

23 I would actually like to start, for context, at line
24 seven, Your Honor. Is that okay?

25 THE COURT: That's fine.

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1 BY MR. PERRY: (Continuing):

2 Q. Okay. Professor Ashenfelter, do you recall being
3 deposed in this case?

4 A. Yes.

5 Q. You were under oath?

6 A. Yes.

7 Q. You swore to tell the truth?

8 A. Yes.

9 Q. You did tell the truth?

10 A. I believe so, yes.

11 Q. I asked you and you answered at page 127, line 7.

12 Question: For the information in Table 2 regarding
13 total pay, did you compare Albertsons stores where there was
14 a Kroger store and where there was not?

15 Answer: No.

16 Question: Did you have the data to perform that
17 comparison?

18 Answer: Yes, I think so.

19 And then do you recall me asking those questions and
20 you giving those answers?

21 A. When I said "I think so," it meant that I might have.
22 It doesn't mean that I actually thought that I did.

23 You have to remember here I didn't do that analysis, so
24 I don't actually know for sure.

25 Q. Oh, I remember you didn't do the analysis. I think we

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1 all remember that.

2 The question is why you didn't do the analysis.

3 A. I didn't have enough time.

4 Q. You didn't have enough time as a retained expert for
5 the Federal Trade Commission?

6 A. There was no way to have enough time. I didn't have
7 enough time to do an analysis of Kroger's wage rates.

8 Q. I didn't ask you that, Professor Ashenfelter.

9 Your testimony is you didn't have enough time to
10 analyze whether or not the union premium that you did have
11 time to calculate was the result of competition between
12 Kroger and Albertsons?

13 A. Yes. It would have taken a design of a serious study,
14 considerably beyond the scope of what I was asked to do.

15 Q. Professor McCrary did that analysis for wage -- hourly
16 wages; right?

17 A. He did an analysis. I have not expressed any opinion
18 about that analysis. Whether it's appropriate or a good one
19 or bad one, I don't know.

20 Q. You could have replicated Professor McCrary's analysis
21 for all of the other components of your union premium;
22 correct?

23 A. No, I couldn't have.

24 As you know, he did his analysis of the -- of the
25 over -- of the other aspects of this -- for this trial

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1 today. In fact, it wasn't until this week that we knew
2 about that.

3 Q. Did you do it between July 4th and this week,
4 Professor Ashenfelter?

5 A. I didn't do anything after I submitted my report.

6 Q. All right. So let's look at DDX20 --

7 A. You asked me about that in my deposition.

8 MR. PERRY: Well, Your Honor --

9 Mr. Rennick, let's have DDX27-46.

10 BY MR. PERRY: (Continuing):

11 Q. You heard Mr. McCrary testify yesterday about this
12 chart; right, Professor Ashenfelter?

13 A. Yes.

14 Q. And he did do the overlap analysis, running the
15 regressions on all of the non-hourly wage components of your
16 so-called union premium; correct?

17 A. Yes.

18 Q. And he testified --

19 A. I think that's all of them, isn't it?

20 Q. It's all of them.

21 And he testified, do you recall, that the results of
22 the overlap regression show that there is no statistically
23 significant evidence that the union premium that you have
24 calculated is the result of competition between Kroger and
25 Albertsons?

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1 MR. HAMBURGER: Objection, Your Honor. Again,
2 this is --

3 THE WITNESS: That's just a total
4 mischaracterization of what this analysis shows, and it's
5 very confusing for my -- for anybody that doesn't understand
6 what's going on here.

7 There are no nonunion workers analyzed in this table.

8 BY MR. PERRY: (Continuing):

9 Q. I didn't ask you about nonunion workers. I asked you
10 about the comparison between localities where Kroger has a
11 store that overlaps with an Albertsons store and where
12 Kroger has a store that doesn't overlap with an Albertsons
13 store.

14 A. But you're -- in order to get at the union/nonunion
15 differential, you have to actually have some data on
16 nonunion workers in the analysis, and this doesn't have any
17 of that.

18 Q. Professor Ashenfelter, I know that.

19 A. I'm sorry. You do know that?

20 Q. I do know that.

21 And you know what I'm asking too; right?

22 A. No. I don't know what you meant.

23 In order to do this analysis that you would do would be
24 to actually estimate the union/nonunion differential and see
25 whether it varies.

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1 Q. I'm asking --

2 A. And that's not what this does.

3 Q. I'm asking you a very different question.

4 I appreciate your -- I do. I think that's very
5 helpful.

6 You would agree that Professor McCrary, by looking at
7 the overlap areas and the non-overlap areas, determined that
8 the various components of the union premium are not the
9 result of competition between Kroger and Albertsons;
10 correct?

11 A. I don't know what this shows.

12 Q. Okay. Well, we heard that yesterday; right?

13 And you're not rebutting this chart on the screen?

14 DDX --

15 A. I haven't expressed any opinion about this except for
16 the fact that you put it up.

17 Q. Okay.

18 MR. PERRY: We can take that down, Mr. Rennick.

19 BY MR. PERRY: (Continuing):

20 Q. You do know this is an antitrust case; right?

21 A. I do know what?

22 Q. You do know this is an antitrust case?

23 A. Yes, I do.

24 Q. And it's about competition?

25 A. It's about mergering, yes.

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1 Q. Well, the Government's labor theory is that Albertsons
2 and Kroger compete with each other in the market --
3 so-called market for grocery union labor.

4 You understand that; right?

5 A. Yes.

6 Q. And your report sets forth no opinion that any of the
7 so-called union premiums are the result of competition
8 between Kroger and Albertsons; right?

9 A. I didn't explain why the union/nonunion wage
10 differential exists. I just explain that it does.

11 Q. And you have not reached an opinion that the union
12 premium is the result of competition between Kroger and
13 Albertsons; right?

14 A. I have not displayed anything that would let me draw
15 that conclusion.

16 Q. And you're offering no opinion about what the wages
17 will actually be at the merged firm once the transaction
18 closes; right?

19 A. I don't know what they'll be.

20 Q. And you are not analyzing or offering an opinion about
21 the amount of non-wage benefits at the merged firm after the
22 transaction closes?

23 A. No.

24 Q. And you said this morning, and I wrote it down, that it
25 is possible that the merged firm could reduce compensation

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1 or benefits; correct?

2 A. Yes.

3 Q. But you have not quantified that possibility; correct?

4 A. Well, I have, in that I've shown what the differential
5 is, and the largest reduction would be what that
6 differential is.

7 Q. I'm sorry?

8 A. The smallest would be nothing.

9 Q. I asked a terrible question, Professor Ashenfelter. I
10 apologize for that.

11 You haven't quantified the likelihood that the merged
12 firm would reduce wages or benefits for union workers;
13 correct?

14 A. Correct.

15 Q. And you, in fact, have no opinion whether it would be
16 substantially likely that the merged firm would reduce
17 compensation or benefits for union workers; correct?

18 A. No. I simply have said it's possible.

19 Q. All right. Last couple of questions, Mr. Ashenfelter.

20 Are you aware that at the pretrial conference in this
21 court on August 23rd the Government lawyer stood at this
22 podium and informed the Court that, quote, "The relevant
23 antitrust question in this case is," quote, "The merger's
24 competitive effects in the labor market"?

25 Are you aware of that?

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1 A. I don't know what he -- I wasn't here, so I don't know
2 what he said.

3 Q. Would you agree that's the relevant antitrust
4 question -- or a relevant antitrust question?

5 A. It's a relevant question. Sure.

6 Q. And you have no opinion on that question; correct, sir?

7 A. Yes.

8 MR. HAMBURGER: Objection, Your Honor. Calls for
9 a legal opinion.

10 THE WITNESS: Oh, I don't have a legal opinion
11 about anything.

12 MR. PERRY: Let me ask a different question.

13 THE WITNESS: If that's a legal opinion, I --

14 THE COURT: Hold on. Hold on.

15 I'm going to allow you to kind of finish what you were
16 saying unless you now decided you're going to change your
17 mind.

18 MR. HAMBURGER: My colleague asked about
19 whether -- about relevant antitrust questions and relevant
20 antitrust markets. That's a legal conclusion. Not
21 something that an expert on labor economics can opine.

22 THE COURT: I think it's the form of the question,
23 so I'll sustain it as to the form of the question.

24 MR. PERRY: Understood, Your Honor. Let me
25 rephrase.

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1 BY MR. PERRY: (Continuing):

2 Q. Setting aside the legal question, which, of course, the
3 Court will decide, Professor Ashenfelter, you are expressing
4 no opinion -- am I right? -- on, quote, "The merger's
5 competitive effects in the labor market"?

6 A. I don't think that's quite right. I think I've
7 explained that the existence of the union/nonunion premium
8 and the revealed preference of the union for two competitors
9 means that there is a potential for an anticompetitive
10 effect.

11 Q. A potential?

12 A. That's right.

13 Q. But you're not offering any opinion that the proposed
14 transaction between Kroger and Albertsons is likely to
15 substantially lessen competition in any relevant labor
16 markets; correct?

17 A. No, that's not correct. I just explained what was
18 correct.

19 Q. All right. Thank you, Professor Ashenfelter.

20 MR. PERRY: Your Honor, if we can go to the
21 deposition one more time. It's PX4158 at page 73, lines 17
22 to 23.

23 May I read that to the witness, Your Honor?

24 THE COURT: Yes.

25 ///

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1 BY MR. PERRY: (Continuing):

2 Q. Do you recall being deposed, Professor Ashenfelter?

3 A. Yes.

4 Q. I asked you this question: "Professor Ashenfelter, are
5 you offering any opinion in this case that the proposed
6 transaction between Kroger and Albertsons is likely to
7 substantially lessen competition in any relevant labor
8 markets?"

9 Do you recall me asking you that question?

10 A. I don't remember, but I'm sure you did.

11 Q. All right. Your answer, sir, quote: "I don't phrase
12 anything in terms of competition, no."

13 Was that your answer at the time?

14 A. Yes. That's probably right.

15 MR. PERRY: Thank you. No further questions,
16 Your Honor.

17 THE COURT: Any redirect?

18 MR. HAMBURGER: No, Your Honor.

19 THE COURT: You can step down.

20 We're going to stand in recess for an hour. We can
21 come back at 1:30.

22 You can start moving around. It's going to take me a
23 minute to grab everything.

24 (Morning session concluded at 12:28 PM.)

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C E R T I F I C A T E

Federal Trade Commission v. Kroger, et al.

3:24-cv-00347-AN

Preliminary Injunction Hearing - Day 14

AM Session

September 13, 2024

I certify, by signing below, that the foregoing is a true and correct transcript of the record, taken by stenographic means, of the proceedings in the above-entitled cause. A transcript without an original signature, conformed signature, or digitally signed signature is not certified.

/s/Jill L. Jessup, CSR, RMR, RDR, CRR, CRC

Official Court Reporter
Oregon CSR No. 98-0346

Signature Date: 9/13/2024
CSR Expiration Date: 9/30/2026

**BY MR. HAMBURGER:
(Continuing): [13]**

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**BY MR. PERRY:
(Continuing): [14]**

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3346/4 3349/2 3350/6
3350/20 3353/21 3355/1
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3363/1 3363/25

**BY MR. WOLF:
(Continuing): [11]**

3278/5 3282/14 3283/20
3288/24 3295/5 3295/13
3296/17 3299/3 3299/25
3303/5 3303/23

**BY MS. BALBACH:
(Continuing): [14]**

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3242/18 3244/10 3248/2
3250/6 3251/20 3255/22
3260/19 3262/2 3266/4
3273/9 3275/6

**BY MS. BLACKBURN:
(Continuing): [1] 3262/7**

**DEPUTY COURTROOM
CLERK: [5] 3229/4**

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MR. HAMBURGER: [53]

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MR. PERRY: [55]

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MR. WOLF: [28]

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